Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-6278

CONDRADO ALMEIDA-SANCHEZ, *Petitioner*,

—v.—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

CRIMINAL DOCKET
UNITED STATES DISTRICT COURT

THE UNITED STATES

vs.

CONRADO ALMEIDA-SANCHEZ

21:176a Comspiracy to Smugg Mari; Transport Mari 2 cts

STATISTICAL RECORD	COSTS
J.S. 2 mailed	Clerk
J.S. 3 mailed	Marshal
Violation	Docket fee
Title	
Sec.	

DATE	PROCEEDINGS
5- 6-70	Ent ord and fld Ind. JS-2 Bond Fixed at $10,000 (CORP) (CASH); ent ord bail reduced to $5000 C/S.
5-11-70	Fld deft's affid and ord apptg Classen Gramm atty.
5-11-70	Fld deft's order apptg counsel James A. Chanoux atty. It is further ordered that the atty Classen Gramm is releived of further responsibility.
5-12-70	Filed Magistrates Transcript
5-15-70	Arr T/N and plea NG; set for O.H. for 5-28-70 at 10am before Mag. (S)
5-28-70	O.H. Ent ord trial call 6-19-70 at 9am. (HARRIS)
6-18-70	Ent ord jury trial trf to Judge Hill (T)

DATE	PROCEEDINGS
6-18-70	JURY TRIAL—Jurors impaneled & sworn. Swore wits & fld exhibits.
6-19-70	FUR JURY TRIAL—Jury retires. (IRVING HILL) (IRVING HILL)
6-22-70	FUR JURY TRIAL—ENT ORD MISTRIAL. Ent ord cont to 6-20-70 at 9:30am for trial. (IRVING HILL)
6-24-70	JURY TRIAL—Jurors impaneled & sworn. Swore wits & fld exhibits. (IRVING HILL)
6-25-70	FUR JURY TRIAL—Mot for J/A denied. Fld & ent verdict Guilty; polling of jury waived; prob. rept. waived. Ent ord comm to cust AG for 5 yrs. impr. (IRVING HILL) JS-3 (ent 6-26-70)
6-26-70	Ent ord deft exhibit "B" returned to deft. Gov't cnsl states govt has no objection (I. HILL)
6-25-70	Fld "NOTICE OF APPEAL"; Fld Affidavit to proceed in Forma Pauperis; Fld Designation of Record on Appeal. (Vera Randall)
6-29-70	Fld ORDER Permitting Appeal in Forma Pauperis. (IRVING HILL)
7-10-70	Fld "SUPPLEMENTAL" Designation of Record on Appeal (Don Cram).
7-20-70	Fld Applic. & Order for Transcript of Trial (Vera Randall, Reptr.) (HILL).
7-20-70	Fld Applic. & Order for Transcript at U.S. Expense of Motion 6-18-70 at 1st trial (Don Cram, Reptr) (HILL) copies to all parties. (Re: Supple. Design).
7-20-70	Fld Judgment retd executed
7-30-70	Fld Original and 3 copies of Reporters Transcript of Record from Court Reporter Vera Randall, marked as Volume No. 1. One of these copies are loaned to Atty James A. Chanoux.

DATE	PROCEEDINGS
8- 7-70	Fld Motion and ORDER thereon to extent time for docketing Appeal, until Sept. 24, 1970. (E.J. SCHWARTZ)
9-17-70	Fld Orig. & two copies plus Clerks Copy of Reptrs. Transcript lv Don Cram
9-30-70	Sent Clks Record and Reptrs Transcripts of Proceedings to C/A.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

AGE: 29 years, a Mexican citizen—Arrested on 4/30/70 on Hwy. 78—Glamis, Calif.

Commissioner's Docket No. 2

Case No. 593

UNITED STATES OF AMERICA

v.

CONRADO ALMEIDA-SANCHEZ

COMPLAINT FOR VIOLATION OF U.S.C. TITLE 21, SECTION 176a

BEFORE A. D. HAWORTH, Name of Judge — Calexico, California, Address of Commissioner

The undersigned complainant being duly sworn states: That on or about April 30, 1970, at Highway 78, near Glamis in the Southern District of California [1]CONRADO ALMEIDA-SANCHEZ did [2]Unlawfully, knowingly, and wilfully transport, conceal, and facilitate the transportaiton of certain contraband merchandise, to wit: approximately 73 kilos of marihuana.

And the complainant states that this complaint is based on the fact that at approximately 12:15 a.m. on April 30, 1970 U.S. Border Patrol officers stopped a 1961 light green Ford two-door, California license KAP 052. While conducting a search of the vehicle for illegal aliens, the marihuana was found concealed beneath the rear seat.

---

[1] Insert name of accused.

[2] Insert statement of the essential facts constituting the offense charged.

After being advised of his rights against self-incrimination and his right to counsel, ALMEIDA stated that he had picked up the car on Second Street in Calexico, California on Wednesday, April 29, 1970.

Preliminary hearing set for 5-15-70 in San Diego.
Bail Reivew and appointment of counsel set for 5-12-70.

And the complainant further states that he believes that

are material witnesses in relation to this charge.

/s/ Charles E. Jones
Signature of Complainant
CHARLES E. JONES
Special Agent
Official Title

Sworn to before me, and subscribed in my presence, April 30, 1970.

/s/ A. D. Haworth
A. D. HAWORTH
Acting United States
Magistrate

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

November 1969 Grand Jury

No. 8800 Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

CONRADO ALMEIDA-SANCHEZ, DEFENDANT

INDICTMENT

Title 21, U.S.C., Sec. 176a—Conspiracy to Smuggle Marihuana; Transporting Marihuana

The Grand Jury charges:

COUNT ONE

Beginning at a date unknown to the Grand Jury up to and including the 30th day of April, 1970, in the Southern District of California and elsewhere, defendant CONRADO ALMEIDA-SANCHEZ and Others Unknown, unlawfully, willfully and knowingly did combine, conspire and agree together and with each other, to violate certain laws of the United States, to wit, to violate Title 21, United States Code, Section 176a.

It was a part of the said conspiracy that the defendants and others would, knowingly and with intent to defraud the United States, import and bring into the United States marihuana contrary to law, and smuggle and clandestinely introduce into the United States marihuana required by law to be declared.

It was further a part of the said conspiracy that the defendant and others would receive, conceal and sell, and facilitate the transportation, concealment and sale of marihuana after being imported and brought in, knowing the same to have been imported and brought into the United States contrary to law.

OVERT ACTS

In pursuance of the said conspiracy and to further the objects thereof, the following overt act, among others, was committed in the Southern District of California: On or about April 30, 1970, defendant CONRADO ALMEIDA-SANCHEZ, drove a 1961 Ford automobile on Highway 78, near Glamis, California.

COUNT TWO

On or about April 30, 1970, within the Southern District of California, defendant CONRADO ALMEIDA-SANCHEZ, with intent to defraud the United States, knowingly received, concealed, and facilitated the transportation and concealment of, approximately 161 pounds of marihuana which marihuana, as the defendant then and there well knew, had been imported and brought into the United States contrary to law, in violation of Title 21, United States Code, Section 176a.

A TRUE BILL:
/s/ [Illegible]
Foreman

/s/ Harry D. Steward
United States Attorney

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

Case No. 8800 Criminal

UNITED STATES OF AMERICA, PLAINTIFF
v.
CONRADO ALMEIDA-SANCHEZ, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(Partial)

Place: San Diego, California

Date: Thursday, June 18, 1970

APPEARANCES:

For the Plaintiff:

HARRY D. STEWARD
United States Attorney

PHILLIP W. JOHNSON
Chief, Assistant United States Attorney

SHELBY GOTT
Assistant United States Attorney

For the Defendant:

JAMES A. CHANOUX

[fol. 3]

SAN DIEGO, CALIFORNIA, THURSDAY,
JUNE 18, 1970, 9:30 O'CLOCK A.M.

• • • •

THE COURT: Let us now discuss the problem you wanted to see me about.

Do I understand that there is some possible motion to suppress evidence in this case?

MR. GOTT: Your Honor—

THE COURT: Let me get a reply from Mr. Chanoux.

MR. CHANOUX: Yes, sir, I do believe that there is a motion to that effect.

THE COURT: I am not from this District, as you know. How can that be timely? There is a requirement in the Federal Rules that a motion to suppress be made before trial. I think that at your omnibus hearing it is necessary for you to notify the court of any such motion.

Was there any such reservation in this case?

MR. CHANOUX: Yes, there was, your Honor. And the court set a date. I believe it was ten days previous from this date for the filing of the written motion. It was my understanding, in talking to the United States Attorney that was handling the case at the time, Mr. Michaels, that we would make it orally in court just prior to the trial, and that this would be acceptable to the court.

[fol. 4] THE COURT: Well, what do you say about that, Mr. Gott?

MR. GOTT: I have no knowledge either way concerning the agreement with Mr. Michaels. My file on the date of May 28th does say that the omnibus hearing form was filed, trial set for June 19th, which is tomorrow, and motion to be heard at time of trial, and moving papers June 9, 1970. I have no doubt that counsel's representation with Mr. Michaels is correct.

THE COURT: All right. It now appears that the motion could probably be heard today, and it is only a question of whether the requirement for written presentation of the motion has been waived. I take it, Mr. Gott, you are saying to me that you have no objection to my deeming the motion properly and timely made.

MR. GOTT: No objection, your Honor.

THE COURT: Very well. That will be the court's view of the matter.

Let me now hear the motion, and let me find out if there is going to be any necessity for taking factual testimony outside the presence of the jury about it; or whether there are affidavits, for example; or perhaps whether you gentlemen can stipulate as to what the operative facts are that would govern the motion.

Do you want to talk about that? Or have you already [fol. 5] talked about it?

MR. GOTT: We have not. But I think very briefly we may be able to agree. If not, my testimony will be very brief.

THE COURT: Let me first hear the motion.

MR. GOTT: Prior to proceeding with that, I would like to call the court's attention to the fact that during the recess I did present to the court's clerk for filing my proposed jury instructions, and have given counsel for the defendant a copy.

THE COURT: Thank you.

Now, do you have any jury instructions, by the way, Mr. Chanoux?

MR. CHANOUX: I do not, your Honor. I have not had a chance to examine the Government's instructions, and there might be a couple that I would ask for. I do have—

THE COURT: You may ask for Mathes and Devitt instructions by number. I would appreciate it if you would put your request in writing, using the number instead of having to rewrite the whole instruction. But I would like to have a piece of paper that we can file that constitutes your instruction request, if you are going to make one.

MR. CHANOUX: Yes, your Honor. Could I file that—

[fol. 6] THE COURT: After the noon recess.

MR. CHANOUX: After the noon recess. Thank you, your Honor.

THE COURT: Now, let's hear your motion.

MR. CHANOUX: Yes, your Honor. It is my position that the evidence seized, namely the marijuana, was as a result of an illegal search and seizure. It is my understanding of the facts that—

THE COURT: Wait just a second. Do you now want to confer briefly to see if you can stipulate what the facts are? Or are you going to have some evidence you would like to put on about it?

MR. CHANOUX: It would only be short testimony from my client as to what took place at the time of the stopping of the vehicle, your Honor.

THE COURT: Well, what would your evidence consist of, Mr. Gott?

MR. GOTT: My evidence would consist of this, your Honor: That two officers of the United States Border Patrol, Immigration and Naturalization, U.S. Department of Justice, were looking for aliens along Highway 78 near Glamis, California—G-l-a-m-i-s—

THE COURT: Where is that town with reference to the U.S.-Mexican Border and the Pacific Ocean?

MR. GOTT: About 50 miles north of the Mexican [fol. 7] border on the road from Calexico to Blythe, California. The evidence would show that this is about the only north-south road in California coming from the Mexican border that does not have an established check point; that because of this it is commonly used to evade check points by both marijuana and alien smugglers. That on occasions, but not at all times, officers of the U.S. Border Patrol maintain a roving check of vehicles and persons on that particular highway. That pursuant to that they stopped this vehicle for the specific purpose of checking for aliens.

That they did check the card of this defendant, and it showed that he was a resident alien—that is, it was a resident alien card entitling him to reside and work in the United States. But that card was marked in a fashion indicating that he resided in Mexicali.

They inquired of him prior to finding any contraband as to where he had come from, and he said from Mexicali, and was going to Blythe, California; and was going to leave the car in Blythe and return to Mexicali by bus.

At that point Officer Shaw, S-h-a-w, in the presence of Officer Carrasco—these two previously mentioned officers of the U.S. Border Patrol—looked under the rear seat of the vehicle for aliens. The evidence would show that

while he himself had never found aliens under the rear [fol. 8] seats of automobiles, that he had heard of it on several occasions. That just prior to this there had been an information bulletin come out from the headquarters of the Border Patrol advising them of a special arrangement that now had developed in the Border Patrol where aliens would sit up right behind the back seat rest and their feet and legs would be doubled up under the rear seat cushion and that springs would be removed from the rear seat cushion to provide space for their legs. That in looking for aliens under the rear seat the officer discovered packages that he believed to be marijuana.

At this point he placed the defendant under arrest and advised him of his rights under the Constitution of the United States; and then proceeded to remove from the vehicle, from under the rear seat, rear quarter panels, and front doors of the vehicle—well, he discovered many other packages of marijuana distributed throughout the various panels in the vehicle.

THE COURT: All right. Now, Mr. Chanoux, do you have any really different view of the facts? Perhaps you are prepared to stipulate that those persons may be deemed to have been called and to have so testified so that the matter presented would become one of law. Or do you want to hear their testimony?

MR. CHANOUX: I would be willing to take Mr. Gott's word for it that that is what the Customs officers [fol. 9] would state if sworn and on the stand. I had not seen—

THE COURT: Let me stop you a second.

If you are prepared to stipulate that these officers are deemed to have been called and to have so testified—which I understand you are—I would like to know that your client will personally join in that stipulation. And I will give you whatever time you need with the interpreter to go over it with him and see if he agrees.

(Counsel, defendant and interpreter conferring.)

MR. CHANOUX: Mr. Almeida explains to me that he is willing to stipulate.

THE COURT: Mr. Almeida, do you understand the stipulation and the agreement that your attorney Mr. Chanoux has just made?

DEFENDANT ALMEIDA: Yes.

THE COURT: Is it personally satisfactory to you?

DEFENDANT ALMEIDA: Yes.

THE COURT: Do you realize that under the agreement it will not be necessary for the officers personally to testify about the circumstances?

DEFENDANT ALMEIDA: Yes.

THE COURT: All right. That stipulation is acceptable to the court.

Now, do you have additional factual testimony that [fol. 10] you want to present, Mr. Chanoux, on this motion to suppress?

MR. CHANOUX: Well, your Honor, only that in the Customs report that I read initially it is stated that upon stopping the vehicle Mr. Almeida stated to the officers that he had driven the car across the border, which is not factually what he advises me. And he advises me that when he stated that he came from Mexicali, that this was so, he had come across, and he would so testify, and had picked up the car in Calexico in the United States and then driven it to the point where he was stopped.

THE COURT: Well, I am perfectly willing to have this defendant say that or anything else you want to examine him about on the stand.

Perhaps Mr. Gott will stipulate that he would be deemed to have been called and to have testified that he did not tell the officers that he had driven in from the Mexican side.

MR. GOTT: We do so stipulate that he would be deemed to have been sworn and so testified.

THE COURT: Is that agreeable with you?

MR. CHANOUX: Agreeable, your Honor.

THE COURT: All right. Let's find out if your client is agreeable, which, in effect, waives his appearance personally on the stand at this stage of the case. Explain [fol. 11] it to him, and I will then inquire of him.

(Counsel, defendant and interpreter conferring.)

MR. CHANOUX: Yes. I am advised Mr. Almeida is willing to so stipulate.

THE COURT: Do you understand, Mr. Almeida, the stipulation and agreement which your counsel has now just completed?

DEFENDANT ALMEIDA: Yes.

THE COURT: Is it personally agreeable to you?

DEFENDANT ALMEIDA: Yes.

THE COURT: And you realize that instead of your taking the stand personally to testify on this one point that the stipulation dispenses with the need for you to get on the stand personally, and you waive that appearance?

DEFENDANT ALMEIDA: Yes.

THE COURT: Very well. That stipulation is acceptable to the court.

Is there now any additional factual evidence that either side desires to present on the motion to suppress?

MR. GOTT: I think it should be stipulated on the record, your Honor, and I am prepared to stipulate that this stopping of the defendant, the search of the vehicle, the arrest of the defendant was all without an arrest warrant and without a search warrant.

THE COURT: I had assumed that that was implicit [fol. 12] in the motion; but it certainly is presently being brought out explicitly. Will you so stipulate?

MR. CHANOUX: It will be so stipulated, your Honor.

THE COURT: All right. Any other factual evidence on the motion, Mr. Chanoux?

MR. CHANOUX: No, your Honor.

THE COURT: Mr. Gott?

MR. GOTT: No, your Honor.

THE COURT: All right. I will hear you, if you want to argue it. I have examined the case authority that each of you gentlemen has been good enough to provide me with—both very recent in our Circuit.

Mr. Gott has made available to me the slip sheet opinion in United States v. Luciano Abreu Miranda decided April 24th of this year; and Mr. Chanoux the case of

Victor Manuel Castillo-Garcia v. United States, No. 22,-991, decided April 10th.

I will hear you now, Mr. Chanoux. Come to the podium if you want to argue the matter in any detail.

MR. CHANOUX: Yes, your Honor. I might say in reference to the case that I submitted to you, it was for the purpose of bringing out the Contreras case that is mentioned in the court's decision as to what the law states does constitute a valid border search. It is my [fol. 13] understanding and belief that unless there is a probable cause to believe that an alien is hiding in the vehicle, unless there has been surveillance on the point of the border, unless there has been some evidence that this man actually did cross the border in that vehicle, that the necessary probable cause for searching the vehicle does not exist. And I would—

THE COURT: Well, let me ask you this: Contreras was decided a long time ago as these things go. It's almost nine years. Contreras has apparently not been overruled explicitly. But Contreras, of course, the discussion of Contreras in the case you cite is dictum—

MR. CHANOUX: That is correct, your Honor.

THE COURT: —and the Miranda case which Mr. Gott cites is a holding; and it would seem to validate the search not only in this case, the case at bar, but probably in Contreras as well.

It relies on a provision of Title 8 and some regulations of the INS, and some provisions of Title 18; and whether those were in existence at the time of Contreras, I do not know. But, in any event, I cannot distinguish the facts as they appear in our case at bar from Miranda; and our case at bar seems almost a fortiori from Miranda. I will hear you if you can distinguish them.

MR. CHANOUX: No, your Honor. It is just my hope and belief that this matter will be taken up to the [fol. 14] higher court, the Miranda decision, and I would like to protect the record in case that case is overturned at that point.

THE COURT: Of course. That is your absolute right and your duty as a counselor, and I understand it.

However, it is my duty similarly to follow the law as declared by the higher courts as best I can distill it from

the opinions of those courts. And I think, doing that, it is incumbent on me, and I now deny the motion to suppress the marijuana.

So we can go ahead and get the jury in, if there is nothing further that either of you desire at this time.

MR. CHANOUX: Thank you, your Honor.

[fol. 15]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

No. 8800-Criminal

UNITED STATES OF AMERICA, PLAINTIFF

v.

CONRADO ALMEIDA-SANCHEZ, DEFENDANT

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing 14 pages are a true and correct partial transcript of the proceedings had in the above entitled cause on Thursday, June 18, 1970, and that said partial transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 11th day of August, 1970.

/s/ [Illegible]
Official Reporter

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE IRVING HILL, JUDGE PRESIDING

No. 8800-Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

CONRADO ALMEIDA-SANCHEZ, DEFENDANT

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

San Diego, California

Wednesday, June 24, 1970

Thursday, June 25, 1970

[fol. 16] Five is the card, the Form I-151.

MR. CHANOUX: No objection, your Honor.

THE COURT: Very well, Exhibit 5 is received and admitted in evidence without objection.

(Card previously marked Exhibit 5 for identification received in evidence.)

MR. GOTT: I further move for Exhibit I-A and I-B, referring to the contents of the cartons marked I-A and I-B.

THE COURT: Yes.

As I understand, Mr. Shaw, the cardboard boxes that now contain I-A and I-B were not in this car, just the contents?

THE WITNESS: No.

THE COURT: Very well. Any objection to I-A and I-B?

MR. CHANOUX: Only as previously discussed with the Court.

THE COURT: Yes. That is the subject of the motion previously denied. It was denied and the objection was overruled and Exhibits I-A and I-B are now received and admitted in evidence.

(Exhibits previously marked I-A and I-B received in evidence.)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 26,514

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CONDRADO ALMEIDA-SANCHEZ, DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Before: BROWNING, CARTER and TRASK, Circuit Judges

PER CURIAM:

Almeida-Sanchez appeals from a conviction for knowingly receiving, concealing and facilitating the transportation and concealment of approximately 161 pounds of illegally imported marijuana. 21 U.S.C. § 176a. His sole contention is that the district court erroneously denied a motion to suppress evidence, marijuana, found in a search of his car, without a warrant. We affirm.

Appellant's vehicle was stopped by two officers of the Immigration and Naturalization Service who were conducting a roving check for aliens some 50 miles north of the Mexican border on Highway 78. One of the officers looked under the rear seat of the automobile and discovered packages that he believed to be marijuana. A subsequent search revealed many other packages of marijuana distributed throughout various parts of the vehicle. While the officer himself had never found aliens under the rear seat of an automobile, he had heard of several instances in which aliens had been concealed there. The officers had just received an information bulletin from the headquarters of the Border Patrol stating that aliens entering the United States illegally, had recently adopted the practice of sitting up directly behind the back seat of an automobile with their feet and legs doubled up

under the rear seat cushion; springs would be removed from the rear seat to provide space for their legs.

This court has approved the right of Immigration Officers acting under 8 U.S.C. § 1357, 8 C.F.R. § 287.1, to stop and investigate vehicles for concealed aliens within a hundred air miles from any external boundary without a showing of probable cause. *Duprez* v. *United States* (9 Cir. 1970) 435 F.2d 1276; *Fumagalli* v. *United States* (9 Cir. 1970) 429 F.2d 1011; *Miranda* v. *United States* (9 Cir. 1970) 426 F.2d 283. A stop and search effected under 8 U.S.C. § 1357 is not a "border search" and does not depend for its validity upon the law of border searches. *See Duprez* v. *United States, supra.*

Since the initial search under the rear seat of appellant's automobile was confined to a place where an alien might be concealed, the search was reasonable in scope. *See Miranda* v. *United States, supra.*

Affirmed.

BROWNING, Circuit Judge, dissenting:

The majority holds that an Immigration and Naturalization officer checking for aliens illegally in this country may stop and search any automobile within one hundred air miles of an external boundary of the United States, at random, without a warrant, and without cause. The majority relies upon prior decisions of this court; and these, in turn, find authority for such conduct in a statute[1]

[1] 8 U.S.C. § 1357(a) and (c):

"(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason

and an administrative regulation.[2]

to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from any external boundary of the United States to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. As such employee shall also have the power to execute any warrant or other process issued by an officer under any law regulating the admission, exclusion, or expulsion of aliens.

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search."

[2] 8 C.F.R. § 287.1(a)(2) reads:

"*Reasonable distance.* The term 'reasonable distance,' as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

Of course, prior decisions of other panels of the court bind this panel, *Etcheverry* v. *United States*, 320 F.2d 873, 874 (9th Cir. 1963), but the decisions relied upon by the majority are so clearly at odds with the requirements of the Fourth Amendment that they should be overruled by the court in banc. Alternatively, decision in this case should be delayed for whatever light may be shed upon the law applicable to "border searches" by the Supreme Court's opinion in *United States* v. *Johnson*, *certiorari granted*, 400 U.S. 990 (1971), set for reargument, —— U.S. ——.

I

As a general rule, to satisfy the Fourth Amendment, a search and seizure must be based upon probable cause and must be authorized by a warrant issued by a judicial officer. An authorized officer may stop and search an automobile on a public highway without a warrant, however, because a moving automobile would disappear before a warrant could be obtained. But, to conduct a constitutional search, the officer must have probable cause to believe the vehicle is carrying contraband; nothing in the mobility of the automobile justifies an intrusion upon personal privacy at the whim or on the unsupported hunch of a government agent. *Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 221 (1968); *Carroll* v. *United States*, 267 U.S. 132, 153-54 (1925).

There is an exception to the probable cause requirement applicable to "border searches" of persons and vehicles.[8] The exception is recognized in the following passage in *Carroll* v. *United States*, *supra*, 267 U.S. at 153-54:

> "Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circum-

[8] *See generally* 77 Yale L.J. 1007 (1968); 10 Ariz. L.R. 456 (1968); 3 St. Mary's L.J. 87 (1971).

stances such a search may be made. It would be intolerable and unreasonable if a prohibition agent was authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. *Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.* But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise . . ." (emphasis added).[4]

As *Carroll* suggests, conceptually the "border search" exception rests upon the inherent right of sovereignty to protect its territorial integrity against intrusion of unauthorized persons or things. *See also United States* v. *Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970); *Alexander* v. *United States*, 362 F.2d 379, 382 (9th Cir. 1966); *Fernandez* v. *United States*, 321 F.2d 283, 285 (9th Cir. 1963); *Witt* v. *United States*, 287 F.2d 389, 391 (9th Cir. 1961). Practically, it is justified by "the peculiar and difficult law enforcement problems that necessarily are presented by the effective policing of our extensive national boundaries." *King* v. *United States*, 348 F.2d 814, 818 (9th Cir. 1965). *See also United States* v. *Glaziou*, 402 F.2d 8, 12 (2d Cir. 1968); *Morales* v. *United States*, 378 F.2d 187, 189 (5th Cir. 1967).

The justification for the "border search" exception to the probable cause requirement extends no further than these conceptual and practical considerations explaining its existence. And since the exception is in derogation of normal Fourth Amendment principles, it must be narrowly construed.

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[4] *See also* Boyd v. United States, 116 U.S. 616, 623 (1886).

Because the power to conduct a border search without probable cause "stems from illegal entry of goods or persons," *United States* v. *Markham*, 440 F.2d 1119, 1123 (9th Cir. 1971), it may be exercised only in connection with a border crossing. This does not mean that a "border search" may be conducted only at a point of entry. It does mean, however, that to fall within the border-search exception to the probable cause requirement of the Fourth Amendment, a search conducted away from the immediate vicinity of the border must be the substantial equivalent of a search on entry. As usually stated, it must be "reasonably certain" from all the circumstances that any contraband that may be found aboard the vehicle would have been there at the time of entry. Thus, in *Alexander* v. *United States*, *supra*, 362 F.2d at 382-83:

> "Where . . . a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States."[5]

Recent cases appear to shift the emphasis from reasonable certainty that the contents of the vehicle were present at the time of entry, to reasonable certainty that the vehicle contains either goods that have just been smuggled or a person who has just crossed the border illegally. *United States* v. *Weil*, *supra*, 432 F.2d 1323;

[5] *See also* Valenzuela-Garcia v. United States, 425 F.2d 1170 (9th Cir. 1970); Castillo-Garcia v. United States, 424 F.2d 482, 485 (9th Cir. 1970); Bloomer v. United States, 409 F.2d 869 (9th Cir. 1969); Rodriguez-Gonzalez v. United States, 378 F.2d 256 (9th Cir. 1967); Leeks v. United States, 356 F.2d 470 (9th Cir. 1966); King v. United States, 348 F.2d 814 (9th Cir. 1965).

United States v. *Markham*, *supra*, 440 F.2d 1119. This formulation suggests that in order to justify a search of an automobile at any place other than the immediate border area, the searching officer must have reason to believe that goods are being brought into the country in the vehicle illegally—in short, a degree of reasonable cause to search is required, though less than the traditional "probable cause."[6]

Whatever the precise definition, however, a border search must be directly related to an entry across a border. A search that is not so related requires probable cause, *see United States* v. *Ardle*, 435 F.2d 861, 862 (9th Cir. 1971); *United States* v. *Kandlis*, 432 F.2d 132, 135 (9th Cir. 1970); for, to repeat, "those lawfully within the country, entitled to use the public highway, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise . . . ." *Carroll* v. *United States*, *supra*, 267 U.S. at 154.

II

There is no apparent reason why these Fourth Amendment principles do not apply with the same force to searches of automobiles for smuggled aliens as they do to searches of automobiles for smuggled merchandise. Yet this court has drawn a sharp distinction between the two.

Despite our recognition that the probable cause requirement of the Fourth Amendment applies to all searches by Customs officials for smuggled merchandise except border searches, this court, alone among the Courts

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[6] Decisions of the Courts of Appeals for the Second, Fourth, and Fifth Circuits convey the same impression. United States v. Glaziou, 402 F.2d 8, 13 n.3 (2nd Cir. 1968); United States v. McGlove, 394 F.2d 75, 78 (4th Cir. 1968); Stassi v. United States, 410 F.2d 946, 951-52 (5th Cir. 1969); Walker v. United States, 404 F.2d 900, 901-02 (5th Cir. 1968); March v. United States, 344 F.2d 317, 324 (5th Cir. 1965). *See* Harris v. United States, 400 U.S. 1211 (1970).

of Appeals,[7] has expressly refused to impose the probable cause restriction upon searches for illegally entered aliens[8] conducted by Immigration and Naturalization officers pursuant to 8 U.S.C. § 1357(a) and 8 C.F.R. § 287.1(a)(3),[9] whether or *not* the search in question could qualify as a "border search" under the tests discussed above. *Duprez* v. *United States*, 435 F.2d 1276, 1277 (1970); *Fumagalli* v. *United States*, 429 F.2d 1011 (1970).

In the latter case, the court said (1013):

> "What all of these cases make clear is that probable cause is not required for an *immigration* search within approved limits [100 miles from an external boundary as fixed by 8 C.F.R. § 287.1(a)(2)] but is generally required to sustain the legality of a search for *contraband* in a person's automobile away from the international borders. Valenzuela-Garcia v. United States, 425 F.2d 1170 (C.A. 9 1970).
>
> Appellant has confused the two rules in his attempt to graft the probable cause standards of the *narcotics* cases *(Cervantes)* onto the rules justifying

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[7] With the possible exception of the Tenth. *See* Roa-Rodriguez v. United States, 410 F.2d 1206 (10th Cir. 1966).

[8] In addition to the cases cited by the majority, *see* United States v. Martin, 444 F.2d 86 (1971); Duprez v. United States, 435 F.2d 1276, 1277 (1970); Fumagalli v. United States, 429 F.2d 1011 (1970); United States v. Avey, 428 F.2d 1159, 1164 (1970); United States v. Miranda, 426 F.2d 283 (1970); Barbara-Reyes v. United States, 387 F.2d 91 (1967).

Earlier cases appear to require probable cause for the warrantless search of an automobile on a public highway by Immigration and Naturalization officers, except in a "broader search." Fernandez v. United States, 321 F.2d 283, 286 (1963); Contreras v. United States, 291 F.2d 63, 65-66 (1961); Cervantes v. United States, 263 F.2d 800, 803 (1959). However, in *Fumagalli*, *supra*, 429 F.2d at 1013, the court disposed of *Contreras* and *Fernandez* simply by asserting, despite langauge in both opinions arguably to the contrary, that both "explicitily *approve* the stopping *and inspection* of vehicles for concealed aliens without any requirement of probable cause." The court discounted *Cervantes* on the ground that it involved a search for narcotics (*ibid.*).

[9] *See* notes 1 and 2.

immigration inspections exemplified by *Contreras*, *Fernandez*, and other cases cited.

Applying these distinct tests in the instant case, the District Court found that the opening of the trunk was proper as part of a routine investigation for 'illegal aliens' and that probable cause to search the car was present when Inspector Camp *smelled* the marihuana odors and saw what appeared to be the corner of a brick of marihuana protruding from the mouth of the duffel bag."

If a reason exists for distinguishing searches for aliens from searches for merchandise, no one—including this court—has yet suggested what it might be. Nothing in the words of the Constitution supports the distinction. And no one suggests that the public interest in excluding inadmissible aliens is greater than that in excluding narcotics and other contraband.

The language in *Carroll* v. *United States*, *supra*, 267 U.S. at 154, upon which the "border search" doctrine is based, indicates that for this purpose a search for aliens is indistinguishable from a search for merchandise: "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country *to identify himself as entitled to come in*, and his belongings as effects which may be lawfully brought in" (emphasis added).

No justification is offered in *Fumagalli*, *Duprez*, or in the majority opinion in this case for the different treatment of searches of vehicles for "smuggled" aliens and searches of vehicles for smuggled merchandise. The opinions simply refer to the statutory grant to Immigration officers of authority "to board and search for aliens" any vehicle "within a reasonable distance from any external boundary of the United States," and to the regulation defining "reasonable distance" as one hundred miles.

But that is not enough. Even assuming that the statute reflects Congress' understanding of the reach of the Fourth Amendment,[10] Congress' view, though entitled to

[10] Alexander v. King, 362 F.2d 379, 381 (9th Cir. 1966).

respect,[11] does not diminish the obligation of the judiciary to interpret and enforce the constitutional mandate independently. Obviously, "the statute could not effectively authorize a search which the Constitution prohibited." *Corngold* v. *United States*, 367 F.2d 1, 3-4 (9th Cir. 1966) (in banc).

The more reasonable interpretation of a statute of this sort is not that it defines a constitutional standard of reasonableness for searches by the government agents to whom it applies, but rather that it delegates authority to be exercised by those agents in accordance with constitutional limitations.[12] Without such a statutory authorization, Immigration officers would have no legal power to search private vehicles for aliens under any conditions. The statute authorizes the officers to conduct such searches—and a search within the statute's terms is not illegal as beyond the officer's statutory authority. But a search within the literal language of the statute is nonetheless barred if it violates the Fourth Amendment. *See, e.g., Boyd* v. *United States*, 116 U.S. 616 (1886).

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[11] Kelly v. United States, 197 F.2d 162, 164 (5th Cir. 1952).

[12] *Cf.* United States v. Weil, 432 F.2d 1320 (9th Cir. 1970); Alexander v. King, *supra*, 362 F.2d at 381; Morales v. United States, 378 F.2d 187, 190 (5th Cir. 1967). *See also* United States v. Thriftimart, Inc., 429 F.2d 1006, 1010 n.5 (9th Cir. 1970).

The congressional committees which authored the Immigration and Nationality Act in 1952 recognized the role the Constitution must play in limiting the statutory authority of Immigration officers. House Report No. 1365 states (U.S. Code, Cong. & Ad. News 1952, Vol. 2, p. 1654):

> "It has been repeatedly held that the right to exclude or to expel all aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare; that this power to exclude and to expel aliens, being a power affecting international relations, is vested in the political departments of the Government, and is to be regulated by treaty or by act of Congress and to be executed by the executive authority according to the regulations so established, *except so far as the judicial department . . . is required by the paramount law of the Constitution to intervene*" (emphasis added).

It is axiomatic that a statute is to be construed to avoid conflict with constitutional standards. The statute authorizing Customs officers to search persons and vehicles for smuggled goods, taken literally, would authorize search of any person or vehicle at any time or place on no more than subjective suspicion.[13] But as noted above, this court and others have held that a showing of probable cause is required for all Customs searches except those qualifying as border searches. As Judge Duniway wrote in *United States* v. *Weil*, *supra*, 432 F.2d at 1323:

> "In order to avoid conflict between this statute and the Fourth Amendment, the statutory language has been restricted by the courts to 'border searches.' We must remember, however, that the phrase 'border search' does not appear in either the statute or the Constitution. It is merely the courts' shorthand way of defining the limitation that the Fourth Amendment imposes upon the right of customs agents to search without probable cause. The latter right is predicated on the right and obligation of the government, which predated the founding of the Republic, to prevent the importation of contraband or of undeclared, and therefore, untaxed, merchandise, and on the universal understanding that persons, parcels and vehicles crossing the border may be searched."[14]

In short, despite the broad sweep of the statute, Customs officers may conduct a search for smuggled mer-

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[13] 19 U.S.C. § 482 reads in part:

> "Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, . . . or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle . . . or otherwise, ..."

[14] *See also* United States v. Glaziou, *supra*, 402 F.2d 8, 12; United States v. McGlove, *supra*, 394 F.2d 75, 77-78; Morales v. United States, *supra*, 378 F.2d 187, 189; Alexander v. King, *supra*, 362 F.2d 379, 381-82; King v. United States, *supra*, 348 F.2d 814, 818; Witt v. United States, 287 F.2d 389, 391 (9th Cir. 1961).

chandise without probable cause only in the restricted circumstances that qualify the intrusion as a "border search." [15] In all other circumstances, probable cause is required. Were it otherwise, "an individual would always be subject to search without probable cause no matter where he was in the United States and no matter how long he had been inside the United States if the search were conducted by the Bureau of Customs. Such a condition would be repugnant to the principles of the Fourth Amendment." *United States* v. *Glaziou*, *supra*, 402 F.2d at 13, n.3.

The statutory provision authorizing Immigration officers to search for aliens should be similarly construed to comport with Fourth Amendment limitations.

Other provisions of the statute have been held to contain implied limitations consistent with constitutional principles. The constitutional limitations articulated in *Terry* v. *Ohio*, 392 U.S. 1 (1968), have been read into the first subparagraph of subsection (a) of section 1357, authorizing Immigration officers to interrogate aliens as to their right to be in the United States. *Au Yi Law* v. *I. & N.S.*, —— F.2d —— (D.C. Cir. March 19, 1971). The Fourth Amendment requirement of probable cause has been read into the second subparagraph of section 1357(a), authorizing arrests by such officers. *Ibid. See also Yam Sang Kwai* v. *I. & N.S.*, 411 F.2d 683 (D.C. Cir. 1969).

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[15] For reasons previously discussed, the limits stated on the face of the statute are not controlling. It may be noted, however, that the statute authorizing Immigration officers to search for aliens is no broader than those which authorize Customs officers to search for merchandise. Indeed, it is narrower.

Customs officers are authorized by 19 U.S.C. § 482 to search vehicles for merchandise "as well without as within their respective districts," with no stated geographic limits. They are authorized by 19 U.S.C. § 1581(a) to board any vehicle "at any place in the United States."

On the other hand, Immigration officers are authorized to search vehicles for aliens only "within a reasonable distance from any external boundary of the United States," 8 U.S.C. § 1357(a)(3), defined by regulation as one hundred miles. 8 C.F.R. § 8 C.F.R. 287.1.

Similarly, subparagraph (a)(3) must be read as authorizing a warrantless search for aliens without probable cause only in accordance with Fourth Amendment limitations applicable to a "border search."

The government does not contend that the search in this case qualified as a "border search." The officers did not know with "reasonable certainty" that the occupants and contents of appellant's car were the same as they had been when the border was crossed—indeed, they did not know that the car had crossed the border at all.[16] And since there was no probable cause to stop the car and search it, appellant's Fourth Amendment rights were violated. *United States* v. *Kandlis*, *supra*, 432 F.2d 132; *Valenzuela-Garcia* v. *United States*, 425 F.2d 1170 (9th Cir. 1970); *Roa-Rodriquez* v. *United States*, 410 F.2d 1206 (10th Cir. 1969); *Montoya* v. *United States*, 392 F.2d 731 (5th Cir. 1968); *Contreras* v. *United States*, 291 F.2d 63 (9th Cir. 1961); *Cervantes* v. *United States*, 263 F.2d 800 (9th Cir. 1959).

III

There is no other basis upon which the search of appellant's car can be justified.

A. We have held that an officer may stop an automobile for investigative interrogation of its occupants if he has "reasonable grounds" for such action. *Wilson* v. *Porter*, 361 F.2d 412, 415 (9th Cir. 1966); *see also United States* v. *Oswald*, 441 F.2d 44 (9th Cir. 1971).

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[16] So far as the record shows, appellant was stopped at random with no reason to know where he had been, or when, except that he was driving north.

It was stipulated that, if called, the Immigration officers would have testified that "they inquired of him [appellant] prior to finding any contraband as to where he had come from, and he said from Mexicali [Mexico], and was going to Blythe, California; and was going to leave the car in Blythe and return to Mexicali by bus." It was also stipulated, however, that appellant would be deemed to have been called and to have testified "that he did not tell the officer that he had driven in from the Mexican side," and, in fact, that "he had picked up the car in Calexico in the United States and then driven it to the point where he was stopped."

This doctrine is of no assistance to the government, however, for it is clear from *Terry* v. *Ohio*, *supra*, 392 U.S. 1, that though an officer may detain and question suspects on mere reasonable belief, any search conducted in connection with such a detention must be based upon reasonable cause to believe that the individuals are armed and dangerous and cannot exceed the scope required to disclose weapons that might be used to harm the officer or others nearby. 392 U.S. at 26-27, 30. In the present case, so far as the record shows, the Immigration officers had no grounds, "reasonable" or otherwise, for stopping appellant. His car was selected at random from those moving north on Highway 78. Even if the officers had grounds for the stop, they had no reason to believe that appellant was armed, and the search they conducted was not confined to that necessary to locate concealed weapons.

B. The government does not seek to sustain the search of appellant's car as a routine administrative inspection under *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), and *See* v. *Seattle*, 387 U.S. 541 (1967). For several reasons the doctrine of these cases is not applicable here.

1. It is at least doubtful that the search in this case could be characterized as an "administrative" one, directed primarily to regulation and only incidentally to the detection of crime. *Cf. Camara* v. *Municipal Court*, *supra*, 387 U.S. at 530, 537. The trunk of appellant's automobile was not searched for evidence of appellant's right to be in the United States. The officers could only have been seeking aliens that appellant might have been bringing into the country illegally, a crime punishable by a $2,000 fine and five years' imprisonment. 8 U.S.C. § 1324.

2. *Camara* and *See* require a showing that valid public interest justifies the particular intrusion. 387 U.S. at 536-37, 539. The governmental interest in excluding illegal aliens is undisputed. However, no effort was made to show that "reasonable administrative standards have been established and are met in the inspection in ques-

tion." *United States* v. *Thriftimart, Inc.*, 429 F.2d 1006, 1008-09 (9th Cir. 1970).[17] The Court in *Camara* stressed the unavailability of alternative procedures less

[17] Since the government did not rely upon the administrative search theory to support the search, it is not surprising that the record is inadequate to support the necessary determinations. However, some evidence relevant to these inquiries was admitted. The government summarizes the stipulated testimony of the Immigration officers as follows:

"Two officers of the United States Border Patrol, Immigration and Naturalization, United States Department of Justice, were looking for aliens along Highway 78 near Glamis, California, which is about 50 miles north of the Mexican border on the road from Calexico to Blythe, California. The evidence would show that this is about the only north-south road in California coming from the Mexican border that does not have an established checkpoint; that because of this it is commonly used to evade checkpoints by both marihuana and alien smugglers. That on occasions, but not at all times, officers of the U. S. Border Patrol maintain a roving check on vehicles and persons on that particular highway. That pursuant to that they stopped this vehicle for the specific purpose of checking for aliens.

That they did check the card of this defendant, and it showed that he was a resident alien—that is, it was a resident alien card entitling him to reside and work in the United States. But that card was marked in a fashion indicating that he resided in Mexicali.

They inquired of him prior to finding any contraband as to where he had come from, and he said from Mexicali, and was going to Blythe, California; and was going to leave the car in Blythe and return to Mexicali by bus.

At that point Officer Shaw, in the presence of Officer Carrasco—these two previously mentioned officers of the U. S. Border Patrol—looked under the rear seat of the vehicle for aliens. The evidence would show that while he himself had never found aliens under the rear seats of automobiles, that he had heard of it on several occasions. That just prior to this there had been an information bulletin come out from the headquarters of the Border Patrol advising them of a special arrangement that now had developed in the Border Patrol where aliens would sit up right behind the back seat rest and their feet and legs would be doubled up under the rear seat cushion and that springs would be removed from the rear seat cushion to provide space for their legs. That in looking for aliens under the rear seat the officer discovered packages that he believed to be marihuana." (Appellee's brief 3-4).

burdensome to Fourth Amendment interests. 387 U.S. at 535, 537. Yet in the present case, nothing at all was offered to demonstrate, for example, why the public interest in preventing the entry of unauthorized aliens would not have been served equally well by an inspection at the international border confined to cars entering the country, rather than a random stop and search of any vehicle traveling on a public highway fifty miles from the border.

3. *Camara* and *See* do not authorize warrantless inspections. 387 U.S. at 528-34. Thus, even if the record were adequate, the search would be invalid for failure to obtain a warrant. The moving automobile exception to the warrant requirement would not excuse the government's failure to obtain prior judicial approval of the roving inspection of automobiles on Highway 78, for by definition the inspection was directed to randomly selected vehicles on the particular stretch of highway rather than to any particular vehicle.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 26,514

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

CONDRADO ALMEIDA-SANCHEZ, DEFENDANT-APPELLANT

ORDER

The panel to which the case was assigned, by a split vote, voted to deny the petition for re-hearing and to reject the suggestion for a hearing in banc.

All members of the court entitled to vote in banc were supplied with a copy of the petition for rehearing and the suggestion for hearing in banc, and were advised of the vote of the panel on the issue.

The court, by a divided vote, rejected the suggestion for a hearing in banc.

ORDERED, that the petition for re-hearing is denied and the suggestion for a hearing in banc is rejected.

SUPREME COURT OF THE UNITED STATES

No. 71-6278

CONDRADO ALMEIDA-SANCHEZ, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 22, 1972

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 489170 848

IN THE

Supreme Court of the United State

No. 71-6278

CONDRADO ALMEIDA-SANCHEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeals (A. 20-35) is reported at 452 F.2d 459.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1971. An order denying, by a split vote, the petition for rehearing and rejecting, by a divided vote, the suggestion for a hearing en banc was entered on February 3, 1972. The Petition for Certiorari was filed on

March 3, 1972 and was granted on May 22, 1972. The jurisdiction of this Court rests upon Title 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following portion of the Fourth Amendment of the Constitution of the United States:

"... the right of the people to be secure in their persons ... and effects against unreasonable searches and seizures ... and no warrants shall issue but upon probable cause ...".

8 U.S.C. §1357(a)(3) reads:

"(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five (25) miles from any such external boundaries to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; ..." (A. 21-22)

8 C.F.R. §287.1 sub. (a) (2) reads:

"*Reasonable distance.* The term 'reasonable distance,' as used in §287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the District Director, or, so far as the power to board and search aircraft is concerned, any

distance fixed pursuant to paragraph (b) of this section." (A. 22)

QUESTIONS PRESENTED

1. Whether a violation of the petitioner's constitutional rights was properly adjudicated by the Court of Appeals for the Ninth Circuit, when " . . . the decisions relied upon by the majority are so clearly at odds with the requirements of the Fourth Amendment . . ."? (A. 23).

2. Whether the search in question could be deemed reasonable under the mandates of the Fourth Amendment of the Constitution?

3. Whether the Ninth Circuit " . . . alone among the Courts of Appeals," (A. 26-27) may expressly refuse to impose the probable cause restriction upon searches for illegally entered aliens conducted by Immigration and Naturalization officers pursuant to 8 U.S.C. §1357(a)(3) and 8 C.F.R. §287.1(a)(2)?

4. Whether the search in question could qualify as a "border search"?

STATEMENT

On June 25, 1970, the petitioner, was found guilty by a jury, of Count-two of an indictment in violation of Title 21, U.S.C. §176(a) charging that petitioner knowingly received, concealed and facilitated the transportation and concealment of marihuana. A previous trial on June 22, 1970 resulted in a mistrial since the jury was unable to reach agreement. (A. 2, 7)

Petitioner appealed the conviction, solely on the point that the Court denied his motion for suppression of the evidence on the basis on an illegal search and seizure. Said motion was heard and decided on a stipulated set of facts (A. 11-13). The facts showed that petitioner was stopped in an automobile by Immigration and Naturalization officers who were maintaining a *roving check of vehicles and persons* on Highway 78 approximately 50 miles north of the Mexican border on the road from Calexico, California to Blythe, near Glamis, California (emphasis added). The officers stopped petitioner's vehicle for the specific purpose of checking for aliens. After determining he was a resident alien entitled to reside and work in the United States, and prior to finding any contraband, they inquired of petitioner as to where he had come from. He said, "from Mexicali (Mexico), and was going to leave the car in Blythe and return to Mexicali by bus." He stated to the officers, "that he had picked up the car on Second Street in *Calexico, California*" (emphasis supplied, A. 5).

In searching the vehicle for aliens, pursuant to the above Statute and Regulation, without benefit of a search warrant or arrest warrant, the officers found marihuana under the rear seat and hidden throughout various parts of the vehicle.

Petitioner was committed to the custody of the Attorney General for a period of five (5) years, and was sent to the Federal Penitentiary at Terminal Island. He was paroled from said penitentiary on January 31, 1972, and deported to Mexicali, Baja, California, Mexico.

SUMMARY OF ARGUMENT

The circumstances surrounding the stop and search of petitioner's vehicle for hidden aliens were not such that could justify the search under the exceptions to the rule found in *Carroll v. United States*, 267 U.S. 132. The government relies strictly on the Statute and Regulation permitting searches of vehicles for aliens within 100 miles of an external boundary of the United States, as justification for the search. 8 U.S.C. §1357(a)(3), 8 C.F.R. §287.1(a)(2).

The vehicle petitioner was driving was stopped at random during a roving check for illegal aliens, by officers of the Immigration Service approximately 50 miles from the external boundary of the United States.

The officers were told by petitioner that he had come from Mexicali (Mexico), but that he had picked up the car in Calexico, California. The officers had no information that the car had ever crossed the border.

After the officers determined that petitioner was legally within the United States, and therefore entitled to travel its highways, the officers proceeded to search under the rear seat for aliens, but found none. This is in strong contrast to the guidelines laid down by this Court in *Carroll supra*, justifying the searches of vehicles for contraband.

There had been no surveillance or circumstances causing suspicion of this particular vehicle. Therefore, absent such, the officers could not have made a valid "border search" for concealed contraband without the reasonable certainty required by the Ninth Circuit in *Alexander v. United States*, 362 F.2d 379 at 382-383.

It is illogical to extend the right to search to include a random stop of a vehicle without probable cause or any of the other safeguards to the Fourth Amendment principles merely because the officers are searching for aliens and not contraband.

The evidence found in the vehicle as a result of such illegal search should have been suppressed pursuant to the *Federal Rules of Criminal Procedure*, Rule 41(e).

This Court has not considered the constitutionality of the subsection in the Statute involved. As stated in *Coolidge v. New Hampshire*, 403 U.S. 443 at 479, "... The stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants ...." The Statute itself, *supra* (a) (3), expressly prohibits the search for aliens in dwellings within twenty-five (25) miles of the external boundary, although permitting access to private lands within those limits. By implication, access to private lands outside the twenty-five (25) mile limit are prohibited, while searches of vehicles up to 100 miles are allowed. The greater intrusion is logically the search of the vehicle.

Assuming the officers had authority under 8 U.S.C. §1357(a)(1) to interrogate petitioner as to his right to be or remain in the United States, his Fourth Amendment rights were violated by the subsequent search of the vehicle without a warrant, without probable cause, and without reasonable certainty under all of the circumstances that aliens were in fact hidden therein.

ARGUMENT

I.

THE IMMIGRATION OFFICER'S SEARCH UNDER THE AUTHORIZING STATUTE DENIES PETITIONER'S RIGHTS AND PROTECTIONS AFFORDED BY THE FOURTH AMENDMENT

A. Rights and Protections under the Fourth Amendment

The Fourth Amendment guarantees the right of individuals to be free from general searches not based upon probable cause and without prior approval of a neutral magistrate. "The basic purpose of this Amendment, (Fourth) as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The general rule in the area of search and seizure is subject only to a few well-established exceptions. The "Founding Fathers" in establishing our fundamental constitutional concepts, especially that of the individual's right to privacy, determined that such should not be transgressed by legislative enactment. One of this Court's main responsibilities since its inception has been to safeguard these rights, in terms of the facts and circumstances of the age in which they were challenged. Though times may change:

> " . . . It is the duty of Courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives, but the vast accumulation of public business brought before it sometimes prevents it, on a first presenta-

tion, from noticing objections which become developed by time and the practical application of the objectionable law." *Boyd v. United States* 116 U.S. 616 (1885).

In review of a recent State Court decision, the Court emphasized the continued protection of these principles in stating "... that no amount of probable cause can justify a warrantless search or seizure absent 'exigent' circumstances ..." *Coolidge, supra.*

B. Applicable Exceptions to the Rule.

Due to the mobility of an automobile an exception has been propounded to enable officers to conduct a warrantless search, since an automobile containing evidence of a crime could disappear before a warrant could be obtained. This exception is recognized in *Carroll, supra,* at 153-154:

"Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such a search may be made. It would be intolerable and unreasonable if a prohibition agent was authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a

competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise . . . ".

Under the circumstances of a *Carroll* search the vehicle may be seized and taken to a police station where it may be searched for evidence. *Chambers v. Maroney*, 399 U.S. 42 (1970). Specifically *Carroll supra* recognizes the "border search" exception due to the inherent right of sovereignty to protect its territorial integrity against intrusion of unauthorized *persons* or things.

Under our facts, the search of the vehicle was conducted approximately 50 miles from the border. The officers had no information concerning Petitioner or the vehicle to indicate that it had actually crossed the border, but rather the car was stopped and searched at random without a search warrant. In *Henry v. United States*, 361 U.S. 98 at 104 (1959), the Court explained that:

> " . . . *Carroll v. United States, supra*, liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxes the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause."

II.

A ROVING CHECK LACKS THE REASONABLENESS NECESSARY FOR A CONSTITUTIONAL SEARCH

The Solicitor General contends that some searches authorized by the statute might arguably be unreasonable; but that the search in this case, although without probable cause, was reasonable under the circumstances. The subsection of the statute involved 8 U.S.C.

§1357(a)(3) does not contain a "reasonableness" standard and this omission goes to the heart of the search involved. The search authorized by the statute must be either reasonable and therefore constitutional *or* unreasonable and unconstitutional under the mandates of the Fourth Amendment. It is illogical to state that it can be both constitutional and unreasonable.

As Judge Browning comments in his opinion:

> "... In the present case, so far as the record shows, the Immigration officers had no grounds "reasonable" or otherwise, for stopping appellant. His car was selected at random from those moving north on Highway 78. Even if the officers had grounds for the stop, they had no reason to believe that appellant was armed, and the search they conducted was not confined to that necessary to locate concealed weapons." (A. 33)

In *Carroll, supra* at 141, the Court comments "... the mere fact that general searches of the vehicles may help to enforce the Eighteenth Amendment does not make those searches reasonable." It would therefore follow that a random stop and search of a vehicle to enforce an Act of Congress, would not make such a search reasonable. Courts have labored to determine whether information presented to a magistrate or that available to a police officer was reliable and sufficient to justify a search under countless factual circumstances. A roving stop and search meets none of the standards necessary to justify an intrusion upon the privacy of the individual. Literally millions of United States citizens travel the highways within 100 miles of the external boundaries of the United States, and therefore are subject to a major interference in their lives, by having their vehicles stopped and

searched at any time, or any place within the distance enunciated by the Regulation.

III.

THE NINTH CIRCUIT ALONE EXPRESSLY HOLDS SUCH SEARCHES FOR ALIENS AS REASONABLE

The Ninth Circuit decisions, relating to searches for aliens authorized by the Statute, carry no true safeguards to Fourth Amendment principles. The cases cited by the majority herein are interesting to note since various statements seem to suggest that the statutory grant is open to qualifications, while holding that it is not.

In *Duprez v. United States*, 435 F.2d 1276 (9th Cir. 1970), a checkpoint station was located approximately 75 miles from the Mexican border. The driver proceeded through the checkpoint traveling 35 miles per hour, and after pursuit, stopped his car and fled from the officers on foot. The Court brings out the fact that Border Patrol officers have a duty to *determine alienage* of persons suspected to be in the United States illegally and states that under the present facts they not only had the right to stop and *investigate* vehicles for concealed aliens, but could justify the search on grounds of probable cause due to the evasive action.

Fumagalli v. United States, 429 F.2d 1011 (9th Cir. 1970), involved the search of an automobile trunk, *at a regularly maintained checkpoint*, on Highway 78 about 49 miles north of the border.[1] After asking the driver to

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[1]It is interesting to note this appears to be approximately one mile from the area of search in the instant case, wherein it was stipulated that Highway 78 does *not* have an established checkpoint.

open the trunk, the officer smelled marihuana and saw a brick of marihuana in plain sight protruding from a duffel bag. The search of the trunk was held justified under the Statute as an immigration search within approved limits and further that probable cause was present to search, due to the officer's observations of the contraband. In a footnote (at 1013, n. 4) the Court states: . . . "Here the search *not only* took place within these limits (*100 miles*) but was at an established checkpoint." (Emphasis added.) This implies that the authority to conduct searches at a checkpoint is even stronger than a search away from one and suggests thoughts of a qualification to the rule.

Factually, *Miranda v. United States*, 426 F.2d 283 (9th Cir. 1970) seems to be the purest example cited of a search based strictly on the Statute. The search therein was under the hood of a 1968 Chevrolet. The appellant appeared nervous, and his hand shook violently as he took the key out of the ignition and tried to open the hood. The Court held the search was justified since the officer testified he had in the past found aliens under the hood of a vehicle, despite appellant's argument that this was inconceivable and that it was physically impossible for an alien to be hidden there.

In the present case, the officer searching the vehicle had not personally found aliens hidden under the rear seats of vehicles but had merely heard of it on several occasions and had information from the headquarters of the Border Patrol advising that such was done. Under the rational of *Miranda, supra*, personal knowledge seems to be drawn into issue, again suggesting some hint of possible qualifications to the rule.

An interesting case, somewhat bridging the gap, is that of *Valenzuela-Garcia v. United States*, 425 F.2d 1170

(9th Cir. 1970), involving the search at a checkpoint of an automobile trunk, wherein marihuana was discovered between the trunk panel and automobile walls. In this case the appellant conceded the authority under the statute to open the trunk in searching for aliens. The Court decided that the search was not lawful, despite the apparent nervousness of appellant and the fact that the trunk floor was dusty with no dust on the panels, since the Court did not reasonably feel an alien could be hidden in that area of the car.

The Court in *Valenzuela*, further quoted from *Contreras v. United States*, 291 F.2d 63 (9th Cir. 1961):

> "... If the search cannot be justified as a reasonable means of determining the citizenship status of the car's occupants, it cannot be justified in any other way under the rubric of probable cause."

The Tenth Circuit in *Roa-Rodriguez v. United States*, 410 F.2d 1206 (1969), held the search of a jacket, in the trunk of a vehicle, for evidence as to the right of an alien to remain in the United States was not justified after an illegal arrest and without probable cause. The search was 90 miles from the border, and the Court indicates the inspectors were justified in stopping the car, but not in conducting a general search for contraband. There is dictum to the effect that under the circumstances the initial stop and search for aliens was proper.

The Fifth Circuit indicated that the predecessor Statute, 81 U.S.C.A. §110 (as amended 8/7/46), was constitutional in *Kelly v. United States*, 197 F.2d 162 (1952). The search here was at a checkpoint where signs were posted on the highway "warning" the public of the presence of Federal Officers at the checkpoint. Appellant turned his car around short of the checkpoint

and sped away. The search in the trunk of the car, after an ensuing chase, was conducted after appellant told the officer he had a little "shine" in the trunk. The officer's stated objective was to search for aliens; and, therefore, the moonshine found in the trunk was held admissible.

The pitfalls against which the Fourth Amendment protects are such as to call into question the efficacy of permitting officers to state they are searching for aliens while in fact they might have contraband in mind at the same time. Surely, any well-trained officer would find it difficult to state that he was only interested in searching for aliens and not, in fact, contraband.

IV.

THE SEARCH IN QUESTION COULD NOT BE JUSTIFIED UNDER THE BORDER SEARCH EXCEPTION

A. Standards for an Extended Border Search.

The geographically extended border search was initially justified where there was "reasonable cause" to suspect that a person was carrying contraband. *Marsh v. United States*, 344 F.2d 317, 325 (5th Cir. 1965); *Valadez v. United States*, 358 F.2d 721, 722 (5th Cir. 1966).

This doctrine depended upon: 1. the *condition* of a vehicle from the time it crossed the border until it was stopped, and 2. whether there was an *unreasonable time* and *distance* between the border and the place where the search was conducted. *King v. United States*, 348 F.2d 814 (9th Cir.), cert denied, 382 U.S. 926 (1965).

Under the *King* rationale, the original reason for the extended border search, i.e., "reasonable cause to respect," remained, but was supplemented by the similarity of conditions, reasonable time, and reasonable space.

The entanglement of these new elements, with the previously followed doctrine, produced a wide range of decisions, wherein, a combination of the two standards were utilized. See *Valadez, supra*, " . . . a search twenty-five (25) minutes from international border crossing—reasonable . . ."; *Leeks v. United States*, 356 F.2d 470 (9th Cir. 1960) " . . . an extended search fifteen minutes from international border crossing—reasonable . . ."; *Contreras, supra*, " . . . an extended search seventy-two (72) miles from border—unreasonable . . . . " *Alexander, supra* at 382-383, revealed an even more interesting formula for determining the validity of the extended border search, as brought out by Judge Browning in his dissent: (A. 25)

> "Where . . . a search for contraband by Customs officers is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such as to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States."

Whereas, a search not related to an entry across a border requires probable cause to be constitutional, see *U.S. v. Ardle*, 435 F.2d 861, 862 (9th Cir. 1971); *U.S. v. Kandlis*, 432 F.2d 132, 135 (9th Cir. 1970); this latest

evolvement of the "border search" doctrine removed the original requirement that the customs officer should have a "reasonable cause to suspect" when the border search is extended. What remains is a diluted "constitutional" standard touched only with a faint requirement of reasonableness and one that affects countless millions "entitled to use the public highways and with *a right* of *free passage*". *Carroll, supra* at 154. (Emphasis added.)

Instead of a citizenry guaranteed the fundamental right of privacy "at home" or "while travelling," they are quite clearly subjected to a "slightly reasonable" search within 100 air miles of an international boundary.

The shrouded danger hinted at in *Murgia v. United States*, 285 F.2d 14 (9th Cir. 1960), and intensified in *King*, was finally developed to its fullest in *Alexander*, and the result is definitely reflected in the present case.

B. Improper Distinctions Are Made Between Searches for Aliens and Searches for Contraband

Clearly, searches for aliens could be upheld under constitutional "border searches," as are searches for contraband. As Judge Browning stated in his dissent: (A. 28)

> "If a reason exists for distinguishing searches for aliens from searches for merchandise, no one—including this Court—has yet suggested what it might be. Nothing in the words of the Constitution supports the distinction. And no one suggests that the public interest in excluding inadmissible aliens is greater than that in excluding narcotics and other contraband."

The Immigration officers involved in the present case, do not even claim that "reasonable cause to suspect," or

that the "totality of the circumstances" gave rise to a reasonably based suspicion of petitioner or the vehicle. They relied upon their blanket statutory authority to search the vehicle for aliens. Even by going so far as to recognize that the search in the present case was not a "border search," the fundamental reasonableness requirement, as amorphous as it is in its modern form, must be respected.

The facts in the present case lend themselves almost point by point with the circumstances mentioned by the Court in *Kandlis, supra*, held as *not* being sufficient to supply the justification to search for contraband.

The Ninth Circuit has quite definitely refused to impose the "probable cause" restriction upon searches for illegal aliens conducted by Immigration and Naturalization officers, and distinguished these from searches for contraband. *Carroll*, does not offer a basis for distinguishing between the types of searches involved, but rather, the searches for aliens and merchandise are placed on equal footing.

C. Constitutional Limits Must Be Included in Interpreting the Statute.

Although Congress' Statutory grant of authority to Immigration officers includes the "power to board and search for aliens any vehicle within a reasonable distance from any external boundary," and one hundred miles is defined as reasonable, it is insufficient to legitimize a denial of constitutional rights.

A more correct interpretation of the legislative intent would be to provide the statute involved, *supra*, with a constitutional reading as proffered by Judge Browning in his Ninth Circuit opinion. Constitutionally, a practical

application of a Statute's language that violates the Fourth Amendment should not survive uncorrected. See e.g. *Boyd v. United States*, 116 U.S. 616 (1886).

In order to stop and search a person or vehicle subsequent to a legitimate entry, as in our case, a customs official should be required to have probable cause in order to protect an individual's privacy, rather than to invade it.

The primary purpose of the border search is to prevent the entrance of contraband and unauthorized persons. Apprehension of criminals is only a secondary effect, not to be promoted by the sacrifice of fundamental rights of the individual. This preventive action should be reasonably accomplished at the border, and not through an unconstitutional device, or an open-ended "100 mile dragnet." The better remedy is not a further diminution of the Fourth Amendment and the rights it secures. 10 Arizona 457, 472 (1968).

The extended border search or "statutory search," exemplified herein, should be conducted with a clarified standard, reasonably enforceable and not devoid of the safeguards afforded by the Fourth Amendment. "Sufficient cause to search" should be the rule and not the exception.

Judge Browning comments that: (A. 31)

"Other provisions of the statute have been held to contain implied limitations consistent with constitutional principles. The constitutional limitations articulated in *Terry v. Ohio*, 392 U.S. 1 (1968), have been read into the first subparagraph of subsection (a) of section 1357, authorizing Immigration officers to interrogate aliens as to their right to be in the United States. *Au Yi Law v. I.&N.S.*, 445 F.2d 217 (D.C. Cir. March 19, 1971). The Fourth Amend-

ment requirement of probable cause has been read into the second subparagraph of section 1357(a), authorizing arrest by such officers. *Ibid.* See also *Yam Sang Kwai v. I.&N.S.*, 411 F.2d 683 (D.C. Cir. 1969).

It is also noteworthy that a further reading of the subsection in question (i.e., §1357(a)(3)) (A. 21-22), permits access to private lands, *but not dwellings*, only within a distance of twenty-five miles from such external boundary, to prevent the illegal entry of aliens into the United States. (Emphasis added.)

Therein exists a legislative exemption of a person's dwelling, no doubt in respect to Fourth Amendment protections. Since " . . . the stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants . . . " *Coolidge supra*, and since in today's "mobile society" an automobile might be called as much a man's castle as is his dwelling, the "border search" exception and statutory provision should demand scrutiny "showing that the exigencies (or circumstances of the situation) made that course imperative." *McDonald v. United States*, 335 U.S. 451, 456.

When it is considered that this twenty-five mile clause was an addition to the subsection (not present in the section when *Kelly, supra*, was decided) and when by implication even access to private lands past a twenty-five mile limit is forbidden, it would be illogical to assume that Congress intended to permit *major* intrusions of Fourth Amendment guarantees up to one-hundred miles, with *no* safeguards, while prohibiting *minor* trespasses to lands outside twenty-five miles, unless accompanied by constitutional safeguards.

To assume otherwise would be to deny the will of Congress and to reduce the protections of the individual. The public interest in excluding illegal aliens must acknowledgedly be weighed against the rights of the private citizen, but "... a search within the literal language of the statute is nonetheless barred if it violates the Fourth Amendment." *Boyd, supra.* (A. 29)

CONCLUSION

The Petitioner, therefore, through his attorney respectfully requests that whereas:

I. the Statute and Regulation in question violate the mandates of the Fourth Amendment;

II. the search was not reasonable under such mandates;

III. the Ninth Circuit alone should not hold the Statutory searches as justifiable; and,

IV. the search in question was not reasonable under the mandates applicable to a "border search,"

the judgment of the Court of Appeals for the Ninth Circuit be reversed.

Respectfully submitted,

JAMES A. CHANOUX

Attorney for Petitioner

July 1972

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6278

CONDRADO ALMEIDA-SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the court of appeals is reported at 452 F. 2d 459, and is reproduced in the Appendix (hereinafter "A.") at pages 20-35.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1971. A petition for rehearing with suggestion for rehearing *en banc* was denied on February 3, 1972. The petition for a writ of certiorari was filed on March 3, 1972, and was granted on May

22, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of the Immigration and Nationality Act of 1952, 8 U.S.C. 1357(a)(3), that authorizes immigration officers within a "reasonable distance" from the border to conduct warrantless searches of vehicles for aliens violates the Fourth Amendment.

2. Whether the search of petitioner's automobile, conducted pursuant to the statutory authorization, was reasonable under the circumstances of this case.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 287(a) of the Immigration and Nationality Act, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> * * * * *

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *.

8 C.F.R. 287.1 provides in pertinent part:

(a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided*, That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect

to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on June 25, 1970, of having knowingly received, concealed, and facilitated the transportation and concealment of approximately 161 pounds of illegally imported marihuana, in violation of 21 U.S.C. (1964 ed.) 176a. He was sentenced to five years' imprisonment. The court of appeals affirmed *per curiam*, one judge dissenting (A. 20-35; 452 F. 2d 459).

The facts concerning the search of petitioner's car and the seizure of the marihuana in it were stipulated in connection with a motion to suppress. The stipulated evidence (A. 11-14) was that Officers Shaw and Carrasco of the United States Border Patrol[1] stopped petitioner's car for the purpose of checking for aliens as it was traveling north on Highway 78 near Glamis, California, about fifty miles north of the Mexican border on the road from Calexico to Blythe, California. Highway 78 "is about the only north-south road in California coming from the Mexican border that does not have an established

[1] The Border Patrol is a uniformed force with the Immigration and Naturalization Service. Its mission is to detect and prevent the smuggling and unlawful entry of aliens into the United States.

check point."[2] For this reason, the road "is comonly used to evade check points by both marijuana and alien smugglers." Border Patrol officers occasionally maintain a "roving check" of vehicles and persons on that highway, and it was in accordance with such a roving check that petitioner's vehicle was stopped "for the specific purpose of checking for aliens."

The officers examined petitioner's entry card and determined that he was a resident alien from Mexicali, Mexico. In response to the officers' questions, petitioner stated he had come from Mexicali, had picked up the car in Calexico, California, and was heading for Blythe, California, where he planned to leave the vehicle and then return to Mexicali by bus. Officer Shaw then checked under the rear seat of petitioner's car for aliens. Although Shaw had never discovered an alien under the rear seat of an automobile, he had heard of such discoveries on several occasions; a recent information bulletin from Border Patrol headquarters had related a technique whereby the seat springs are removed from the rear seat cushion and aliens sit upright behind the back seat rest, with their legs doubled up under the cushion. In making this inspection, Shaw discovered packages that he believed to contain marihuana. Petitioner was then arrested, and a further search of the car

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[2] For the convenience of the Court, we are furnishing with this brief a map of the area involved. As the map shows, Highway 78 does not itself run from the Mexican border, but Glamis is on a segment of this road that heads northeast through a desolate region, and is approximately 25 air miles north of the Mexican border.

disclosed many other packages of marihuana concealed in various parts of the vehicle. The motion to suppress was denied (A. 16, 19).

SUMMARY OF ARGUMENT

1. The Border Patrol's traffic checking operations, which involve a limited inspection of certain vehicles for the presence of aliens who have entered the country unlawfully, are conducted without warrant and usually without probable cause to believe that any particular vehicle is carrying an illegal alien. We contend that these inspections satisfy the Fourth Amendment's proscription against "unreasonable" searches and seizures. The standard by which to judge the reasonableness of a search conducted on less than probable cause but as part of a program of random or universal inspections has been articulated by this Court in prior decisions: whether, balancing the governmental need against the invasion of privacy, the program as a whole is reasonable, and whether the particular inspection is an appropriate part of that program.

2. Whether a program of random or universal inspections is reasonable under the Fourth Amendment depends on the governmental objective it is designed to promote and the intrusiveness of the searches it authorizes.

a. This Court long ago recognized the special status of searches at the border, which are bottomed on the nation's inherent right to protect the integrity of its borders against the unauthorized entry of per-

sons or things. Such searches, without warrant and without probable cause, have regularly been upheld as reasonable under the Fourth Amendment. Legislation restricting the entry of aliens, which dates from the late 19th Century, is founded on the same right of sovereignty. The history of increasing restrictions on immigration has been accompanied by the growing incidence of alien smuggling and sophisticated techniques for evading inspection at ports of entry. Congress has responded by affording to immigration officers the powers they have needed to enforce Congressional immigration policy.

Because of the vastness of our land borders, it is not possible to enforce that policy effectively at the border itself. Smugglers frequently arrange to transport illegal entrants by vehicle inland from remote and infrequently patrolled crossing points. In order to apprehend these illegal entrants and to deter such smuggling operations, Congress has authorized immigration officers to inspect vehicles for the presence of aliens within a reasonable distance of the border. The traffic checking operations have been highly productive; their elimination would severely impair the effectiveness of the enforcement program.

b. The inspections authorized under the statute are carried out in a manner that ensures a minimal intrusion into the privacy of travelers. Both the decision to establish a highway checkpoint and the decision to check a particular vehicle reflect a concern for minimizing unnecessary stops and inspections, which in any event involve only a brief inter-

ruption of travel. The inspection itself is necessarily limited to places where a person could be concealed. Thus, no search may be made of the automobile's glove compartment or of the personal belongings of its occupants. Because of the relatively minor intrusion, the three courts of appeals that have passed on the issue have upheld the statute and have sustained the traffic checking operations as a reasonable and constitutional exercise of the statutory authority.

3. The check of petitioner's vehicle, which took place on a road leading north from the border that is frequently used by smugglers to evade established checkpoints on other highways, was a reasonable and proper part of a traffic check program.

ARGUMENT

The central issue in this case is whether Congress may, consistently with the Fourth Amendment, seek to ensure effective control over the illegal entry of aliens into the United States by empowering immigration officers to inspect vehicles for aliens within a reasonable distance from the border without a warrant or probable cause. The outcome turns on the constitutionality of 8 U.S.C. 1357(a)(3), for it is and has always been petitioner's broad contention that *all* searches for aliens not made at the border itself must be founded on probable cause in order to comport with the Fourth Amendment—in other words, that the statute is unconstitutional unless read to include a requirement of probable cause. It is our position, to the contrary, that the statute is a valid

exercise of Congressional power because the authority that it grants to conduct an inspection is reasonable within the meaning of the Fourth Amendment, when considered in light of the problem to which the statute is addressed and the limited intrusion on privacy that it authorizes.

I

THE FOURTH AMENDMENT PERMITS OTHERWISE REASONABLE SEARCHES WITHOUT WARRANT AND WITHOUT PROBABLE CAUSE

The accomplishment of the Border Patrol's mission depends in large measure on its traffic checking operations, which involve vehicle stops and, in a relatively few instances, a minimally intrusive physical inspection of the vehicle. To be effective, these operations must be conducted, at least in part, on a random or universal basis. Thus, while trained officers may be inclined to stop and inspect primarily those vehicles which their experience tells them are more likely to be bearing illegal aliens, they frequently determine to check, say, every fifth vehicle or, in light traffic, each vehicle that passes, without any special suspicion about particular vehicles.

We therefore do not take the position that the checking operations are justified because the officers have probable cause or even "reasonable suspicion" to believe, with respect to each vehicle checked, that it contains an illegal alien. Apart from the reasonableness of establishment of the checking operation in this case, there is nothing in the record to indicate that the Border Patrol officers had any special

or particular reason to stop petitioner and examine his car. Our position is that, just as in *Terry v. Ohio*, 392 U.S. 1, 20, "the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."

The Fourth Amendment has two distinct branches, the first guaranteeing freedom from "unreasonable searches and seizures," and the second conditioning the issuance of warrants upon probable cause and particular description of the object. Although the two branches are normally intertwined, the Court has already held that there are circumstances where probable cause is not necessary to conduct a valid "search" or "seizure." *Terry* v. *Ohio*, 392 U.S. 1. See, also, *Adams* v. *Williams*, No. 70-283, decided June 12, 1972. In one recent line of decisions, the Court has spoken of valid searches based on warrants for certain kinds of inspection issued without probable cause to believe the particular object of the search involves a violation of law, *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541. The Court has also long held that there are situations, like those involving highly mobile vehicles, where warrants may be unnecessary. *E. g.*, *Carroll* v. *United States*, 267 U.S. 132. We believe that, taken together, the principles of these cases extend to a special and historically established kind of factual setting where probable cause is absent, where a warrant is impractical, but where a brief and limited search is nonetheless constitutionally reasonable.

In *Terry* v. *Ohio*, *supra*, this Court concluded that whenever "a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person" within the meaning of the Fourth Amendment. 392 U.S. at 16. Similarly, even the essentially administrative objective of an inspection, as distinguished from a police search for criminal evidence, amounts to a "search" for Fourth Amendment purposes. See *Camara* v. *Municipal Court*, *supra*; *United States* v. *Biswell*, No. 71-81, decided May 15, 1972. Compare *Harris* v. *United States*, 390 U.S. 234. The holding of *Terry*, however, is that whether the legality of a particular kind of confrontation between police and citizens depends on the existence of probable cause turns on a balancing of the governmental interest which allegedly justifies the official intrusion upon constitutionally protected interests as against the invasion entailed by the search or seizure. 392 U.S. at 20-21. Applying that test, the Court concluded that in a setting where he has "reason to believe" he is dealing with an armed man, a law enforcement officer may conduct an appropriately limited search, even in the absence of probable cause. 392 U.S. at 27.

But it is also clear that in some situations the permissible reason to conduct a search need not be focused with particularity on the object of the search. This is the teaching of the administrative search cases, *Camara* and *See*, *supra*. In those cases, the Court determined that an "area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment." *Camara*, *supra*, 387 U.S.

at 538. There, in the context of a city-wide program of routine and periodic building inspections for code-enforcement purposes, the constitutionality of any particular inspection was found to rest not upon probable cause to believe that a violation will be uncovered in that building but rather upon the reasonableness of the inspection program itself. Thus, in *Camara*, "the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building" (387 U.S. at 536). The Court held in *Camara* and *See* that when entry to a particular building is refused, a warrant may be issued "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (*id.* at 538).

The *Camara* rationale was applied in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, and *United States* v. *Biswell*, No. 71-81, decided May 15, 1972, to *warrantless* searches on a *random* rather than universal basis.[8] In *Colonnade* the Court held that, in view of the historic regulation of the liquor industry, Congress had ample power—which the majority concluded it had not exercised—to authorize warrantless searches of the premises of retail liquor dealers as part of a program to enforce the federal excise tax laws. In *Biswell* the Court upheld a statute

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[8] We show below why the *Camara* warrant procedure would, as in *Colonnade* and *Biswell*, be inappropriate in the case of Border Patrol traffic checking operations.

authorizing warrantless entry into the premises of licensed firearms dealers for the purpose of inspecting records or firearms as part of a program to secure compliance with the Gun Control Act. What these cases demonstrate is that under the Fourth Amendment, the governing standard is one of reasonableness. While the absence of a warrant or of probable cause about a particular person or place may raise warning signals, the absence of one or both does not necessarily condemn the practice. Any particular inspection should be upheld if the program as a whole is reasonable and if the particular inspection satisfies the criteria for conducting the general inspection. See *Camara, supra*, 387 U.S. at 538.

The Court in *Camara* itself required that since the "controlling standard" is one of reasonableness, nothing being decided there about the need for warrants was "intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." 387 U.S. at 539. Perhaps the most solidly recognized exception to the warrant requirement has been the oft-repeated principle of *Carroll* v. *United States, supra*, that the Fourth Amendment's ordinary insistence on warrants does not apply to "goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant" because "it is not practicable to secure a warrant." 267 U.S. at 151, 153. See, also, *Chambers* v. *Maroney*, 399 U.S. 42, 48-51; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 459-460.

Applying the constitutional analysis charted in the opinions we have just discussed, lower courts have sustained the constitutionality of random or universal stops and searches analogous to the Border Patrol traffic check in the present case. A number of courts, for example, have upheld random checks and roadblocks for the purpose of checking driver's licenses and registrations,[4] or to apprehend a fleeing felon,[5]

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[4] Random stops have been sustained in *Myricks* v. *United States*, 370 F. 2d 901 (C.A. 5), certiorari denied, 386 U.S. 1015; *Lipton* v. *United States*, 348 F. 2d 591 (C.A. 9); *Mincy* v. *District of Columbia*, 218 A. 2d 507 (D.C. Ct. App.); *State* v. *Kabayama*, 98 N.J. Super. 85, 236 A. 2d 164 (App. Div.), affirmed, 52 N.J. 507, 246 A. 2d 714, affirming, 94 N.J. Super. 78, 226 A. 2d 760 (County Ct.); *State* v. *Williams*, 237 S.C. 252, 116 S.E. 2d 858.

Roadblock or universal checks have been upheld in *United States* v. *Croft*, 429 F. 2d 884 (C.A. 10); *State* v. *Smolen*, 4 Conn. Cir. 385, 232 A. 2d 339 (App. Div.), certiorari denied, 389 U.S. 1044; *Commonwealth* v. *Mitchell*, 355 S.W. 2d 686 (Ky.); *City of Miami* v. *Aronovitz*, 114 So. 2d 784 (Fla.); *Morgan* v. *Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512; *State* v. *Severance*, 108 N.H. 404, 237 A. 2d 688; *People* v. *Washburn*, 265 Cal. App. 2d 665, 71 Cal. Rptr. 577.

See also *Commonwealth* v. *Abell*, 275 Ky. 802, 122 S.W. 2d 757, upholding the practice of requiring all trucks to stop at a weighing station.

See generally Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles*, 51 Calif. L. Rev. 907 (1963); Comment, *Freedom of the Road: Public Safety vs. Private Right*, 14 DePaul L. Rev. 381, 407-409 (1965); Note, *Random Road Blocks and the Law of Search and Seizure*, 46 Iowa L. Rev. 802 (1961); Note, *The Driver's License "Display" Statute: Problems Arising from Its Application*, 1960 Wash. U.L.Q. 279.

[5] *United States* v. *Kuntz*, 265 F. Supp. 543 (N.D. N.Y.).

[Footnote continued on page 15]

or simply to investigate a suspicious gathering of vehicles.[6] Even where the stop or search reveals evidence of a different crime,[7] there is no constitutional infirmity so long as the stop is made in good faith and not as a subterfuge for uncovering evidence of the other crime,[8] and so long as the purpose is a legitimate one.[9]

The typical justification for such police activity is that society's need for road safety justifies the minor

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[5] [Continued]

And see *Brinegar* v. *United States*, 338 U.S. 160, 183 (Jackson, J., dissenting):

> If we assume * * * that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. * * *

[6] *United States* v. *Bonanno*, 180 F. Supp. 71 (S.D. N.Y.) (the Appalachin conspiracy case). The convictions were ultimately reversed *sub nom. United States* v. *Bufalino*, 285 F. 2d 408 (C.A. 2), but the court of appeals did not pass on the suppression ruling. *Id.* at 413 n. 6.

[7] *E.g.*, *State* v. *Williams*, *supra* note 4; *United States ex rel. Farrugia* v. *Bhono*, 256 F. Supp. 391 (S.D. N.Y.).

[8] See, *e.g.*, *Cox* v. *State*, 181 Tenn. 344, 181 S.W. 2d 338, and *Robertson* v. *State*, 184 Tenn. 277, 198 S.W. 2d 633, where evidence gathered during a random license check was suppressed because the license check was used as a subterfuge. But see, for the opposite disposition on similar facts, *United States ex rel. Farrugia* v. *Bhono*, *supra* note 7.

[9] The arbitrary utilization of roadblocks for universal and warrantless stopping and searching of persons and vehicles in parts of Los Angeles was held unreasonable in *Wirin* v. *Hor-*

intrusion on the privacy of travelers.[10] Similar reasoning has been used to uphold the screening and searching procedures employed at airports to minimize the danger of hijacking,[11] and to enforce agricultural quarantines.[12] Analogous situations may of course be hypothesized.[13]

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rall, 85 Cal. App. 2d 497, 193 P. 2d 470. Similarly, routine vehicle searches to "curb the juvenile problem" or "in the hope that some criminals will be found" have been held impermissible. *People* v. *Gale*, 46 Cal. 2d 253, 256, 294 P. 2d 13, 15.

[10] See, *e.g.*, *Myricks* v. *United States*, *supra* note 4, 370 F. 2d at 904:

> The State can practice preventative therapy by reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness. That this requires a momentary stopping of the traveling citizen is not fatal. Nor is it because the inspection may produce the irrefutable proof that the law has just been violated. * * * In the accommodation of society's needs to the basic right of citizens to be free from disruption of unrestricted travel by police officers stopping cars in the hopes of uncovering the evidence of non-traffic crimes, * * * the stopping for road checks is reasonable and therefore acceptable. * * *

[11] See *United States* v. *Lindsey*, 451 F. 2d 701 (C.A. 3), certiorari denied, 405 U.S. 995; *United States* v. *Epperson*, 454 F. 2d 769 (C.A. 4); *United States* v. *Bell*, C.A. 2, No. 72-1322, decided July 5, 1972; *United States* v. *Slocum*, C.A. 3, No. 72-1231, decided June 13, 1972; *United States* v. *Lopez*, 328 F. Supp. 1077 (E.D. N.Y.).

[12] In *United States* v. *Schafer*, C.A. 9, No. 71-1004, decided June 5, 1972, petition for certiorari pending, No. 72-5040, the court of appeals sustained the admissibility in evidence of narcotics found during an official search, authorized by statute and regulation, of the baggage and personal effects of aircraft passengers departing Hawaii. The purpose of the search was to enforce the quarantine of certain plants and insects.

[13] See, *e.g.*, *United States* v. *Bonanno*, *supra* note 6, where the court put the following case:

[Footnote continued on page 17]

It is fair to conclude, therefore, that a vehicle stop and inspection even though without a warrant or specific probable cause is permissible under the Fourth Amendment if made as part of a program of random or universal stops that is itself reasonable, measured by the governmental need and the extent of official obtrusiveness. The remaining question, therefore, is whether the Border Patrol's program of traffic checking, as authorized by statute, satisfies the established criteria of reasonableness.

II

THE TRAFFIC CHECKING PROCEDURE IN THIS CASE IS REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT PROMOTES A SUBSTANTIAL GOVERNMENTAL OBJECTIVE AND DOES NOT DISPROPORTIONATELY AFFECT CONSTITUTIONALLY PROTECTED INTERESTS

A. The Effective Policing of Our National Boundaries to Prevent the Entry of Unauthorized Persons Presents Peculiar and Difficult Law Enforcement Problems.

In urging the validity of the statutory authorization to conduct routine, warrantless inspections of vehicles for aliens within a reasonable distance of the border, we start with the proposition that such

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[18] [Continued]

Let us suppose that a policeman standing outside an apartment house heard a cry for help, or a cry that a woman was being attacked. He could undoubtedly stop and question all those who sought to leave the apartment house immediately thereafter, even though it again was perfectly possible that no one present was guilty of wrongdoing, and certain that not *all* of the persons stopped were guilty of the commission of a crime. [180 F. Supp. at 79 n. 15; emphasis in original.]

inspections, if made at the border itself, would clearly comport with the Fourth Amendment. This Court has recognized that border inspections of an incoming traveler's person and effects in order to establish their right to entry under the customs laws are valid notwithstanding the absence of a search warrant or any degree of suspicion directed at the individual searched. The special status of border searches and their compatibility with values protected by the Fourth Amendment were acknowledged by this Court as early as 1886 in *Boyd* v. *United States*, 116 U.S. 616, 623, where the Court observed that searches for and seizures of merchandise concealed to avoid the payment of duties, having been authorized by English statutes for two centuries and by the United States since its inception, would not be deemed "unreasonable" under the Fourth Amendment. See also *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 75-76.

Some forty years later, in *Carroll* v. *United States*, 267 U.S. 132, 154, the Court even more explicitly recognized the sovereign's inherent right to search at the border, observing in dictum that travelers and their vehicles may, without a warrant, be "stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." [14]

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[14] Petitioner and the dissenting judge below place reliance on the immediately following sentence in *Carroll*, which

In accordance with these pronouncements, the lower federal courts have consistently held that border searches are not governed by the warrant or probable cause aspects of the Fourth Amendment, and do not violate the basic proscription in that Amendment against "unreasonable" searches and seizures. See, *e.g.*, *United States* v. *Glaziou*, 402 F. 2d 8, 12 (C.A. 2), certiorari denied, 393 U.S. 1121; *United States* v. *Weil*, 432 F. 2d 1320, 1322-1323 (C.A. 9), certiorari denied, 401 U.S. 947; *United States* v. *Warner*, 441 F. 2d 821, 832-833 (C.A. 5), certiorari denied, 404 U.S. 829. The courts have recognized also that a border search is no less reasonable if conducted a short distance from the point of entry, when the circumstances, including the time elapsed and distance traveled and the manner and extent of surveillance, provide reasonable cause to believe that any contra-

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states: "But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

For two distinct but interrelated reasons, *Carroll* cannot be said to be controlling on this issue. First, the Court in *Carroll* was addressing itself to the validity of vehicle searches in the interior of the country where no border protection objective was involved. Thus the Court did not have any occasion to consider how geographically close to the border a customs (or alien) search must be to be covered by the border search principle. Second, *Carroll* was speaking to the issue of vehicular searches for contraband and was not concerned with the problem of control over the illegal entry of aliens. As we argue later, there is a substantial difference, in terms of intrusiveness and reasonableness, between a search for contraband and a limited check for the presence of aliens.

band found on the vehicle was aboard at the time of entry or was recently smuggled. See, *e.g.*, *Alexander* v. *United States*, 362 F. 2d 379 (C.A. 9), certiorari denied, 385 U.S. 977; *United States* v. *Weil*, *supra*, 432 F. 2d at 1323. There has, in sum, never been any serious doubt that border searches, whether conducted at the national boundary or within reasonable proximity to it, are reasonable even though performed in a routine manner without specific facts casting suspicion on the particular vehicle or its occupants.

Although searches for illegal entrants are not quite as ancient as border searches under the customs laws, the basic goal is the same—preserving the integrity of our borders—and it is our position that the same constitutional principles apply. Federal legislation restricting the entry of aliens dates only from 1875, see *Kleindienst* v. *Mandel*, No. 71-16, decided June 29, 1972, slip opinion p. 8; Gordon and Rosenfield, *Immigration Law and Procedure*, Vol. 1, § 1.2 (rev. ed.), and the first statutory authorization for the inspection and medical examination of aliens was apparently the Act of March 3, 1891, 26 Stat. 1084. As the problem of illegal entry of aliens grew, Congress responded by tailoring the enforcement powers of immigration officers to fit the expanding need. Thus, at the time of World War I, when the limitations upon entry had become more severe and the incidence of evasion more widespread, Congress, by the Act of February 5, 1917, 39 Stat. 874, granted authority to immigration inspectors to "board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are

being brought into the United States." 39 Stat. 886.[15] When by 1946 it had become apparent that border searches for aliens were not effective by themselves in deterring the illegal entry of aliens, Congress conferred the additional power to inspect vehicles "within a reasonable distance from any external boundary of the United States." 60 Stat. 865.[16] The 1946 language, with some modification, was carried forward in the Immigration and Nationality Act of 1952, 66 Stat. 163, which added yet a further clause empowering immigration officers to patrol private lands within twenty-five miles from an external border to prevent the illegal entry of aliens.

Thus, Congress has taken the measured steps necessary to combat the evolving techniques of evading its policy of immigration control. As the dissenting judge below acknowledged (A. 24), the enforcement problems are "peculiar and difficult" and require unique solutions. See *King* v. *United States*, 348 F. 2d 814, 818 (C.A. 9). Many thousands of aliens enter this country illegally each year by evading in-

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[15] The language was continued in approximately the same form in the Act of February 27, 1925, 43 Stat. 1049-1050, and, with the addition of "aircraft", is substantially embodied in present 8 U.S.C. 1225(a), which provides generally for inspection of entering aliens.

[16] The legislative history of the 1946 amendment is sparse, the Committee Reports indicating in essence only that the Department of Justice recommended enlargement of the search power. See H. Rep. No. 186 and S. Rep. No. 632, 79th Cong., 1st Sess. See also H. Rep. No. 1929, 78th Cong., 2d Sess., dealing with an identical bill introduced the previous year which passed the House but not the Senate.

spection, either through concealment when entering at a port of entry or by clandestine entry at other than a port of entry. The immigration officers' unquestioned power to search at entry is one effective tool in preventing illegal entry at a regular port. The problem of detecting and deterring such entry at other points is considerably more difficult.

The vastness of our land borders with Canada (3,987 miles) and with Mexico (1,945 miles) makes it impossible to detect and exclude every alien who determines to enter this country unlawfully by apprehending him on the border itself. Every effort is made to minimize the need to conduct alien detection activities in the interior by improving the efficiency of operations along the borders. The basic operation of the Border Patrol is the "line watch," whereby those points most often used by border violators are kept under surveillance by officers on foot, in vehicles, or in observation aircraft. In certain active areas the Patrol has installed electronic equipment to detect intrusions. To seal means of egress from the immediate border area, officers routinely check transportation terminals, freight and passenger trains, and railroad yards.

These operations alone, however, do not provide an effective solution to the alien control problem. For understandable reasons, the problem is most acute along our southern border, and 1400 of the 1700 men in the Border Patrol are assigned to the Mexican border. We are advised by the Immigration and Naturalization Service (hereinafter "INS") that the

method commonly employed by smugglers of illegal aliens is to arrange for a group of aliens to cross the border at a point away from a fixed station and to make their way to a predetermined spot, often led by a guide the smuggler furnishes,[17] where a vehicle supplied by the smuggler will be waiting to take them inland. See, for example, the facts in *United States* v. *Ketola*, 455 F. 2d 83 (C.A. 9), petition for a writ of certiorari pending, No. 71-6570. The principal means of detecting and preventing such smuggling activity is through the Border Patrol's traffic checking operations, conducted pursuant to the statutory authority here in issue.[18]

The authority conferred by the statute in question is actually claimed and exercised for three kinds of traffic inspection operations. "Permanent" sites are in most instances located at a point beyond the convergence of several roads leading from the border.

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[17] See *Carranza-Chaidez* v. *United States*, 414 F. 2d 503 (C.A. 9).

[18] We think it is relevant to the reasonableness of the traffic checking operations that, because illegal entrants commonly evade inspection at the border and move inland by vehicle, the inspection that would ordinarily have occurred at the border must as a practical matter be deferred to a place removed from the border. The Fifth Circuit has relied on this notion of a deferred border search in upholding the statute here in question. See, *e.g.*, *United States* v. *McDaniel*, C.A. 5, No. 71-2810, decided May 11, 1972, slip opinion pp. 4-8. The Ninth Circuit's disclaimer of reliance on this justification for the traffic checks (A. 21) may have been intended to emphasize that the standard of some suspicion, applicable to vehicular searches for merchandise (see *supra*, pp. 19-20), does not govern inspections for aliens under 8 U.S.C. 1357(a)(3).

This permits the checking of a large amount of traffic with a minimum number of officers. To avoid repeated checking of commuter and suburban traffic, the sites are removed from urban areas. There are 13 such sites, all in the area of the Mexican border and all but one located more than 25 but less than 100 air miles from the border.[19] Permanent sites are operated on a 24-hour schedule except where manpower shortages, weather conditions, or traffic flow interfere. At the site all traffic is slowed. Depending on weather and traffic conditions, the officers wave on some of the vehicles, stop some in order to question the occupants, and conduct a limited inspection of [redacted] of those that have been stopped.[20] The advantage of permanent sites is that they can be equipped to handle a large volume of traffic safely and efficiently. The disadvantage is that experienced smugglers are aware of them and can easily avoid

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[19] In addition to the factors already identified, locating the site more than 25 miles from the border permits the checking of nonresident alien crossers from Mexico who violate the terms of their admission. We are informed that over one million aliens hold crossing cards that permit their entry to visit, shop, or conduct business within 25 miles of the border for as long as 72 hours. Some 88 million such entries were made in fiscal year 1971. Additional documentation must be issued at the port of entry if the alien wishes to go farther inland.

[20] Although the decision to stop for questioning or vehicle inspection is sometimes made on a random basis, we are advised that officers frequently take into account the number of persons in the vehicle, the way the car is riding (*e.g.*, low in the rear), the size of the vehicle (*e.g.*, pick-up truck or van), and the apparent nationality of the occupants.

interception by taking a different route, walking around the checkpoint, or checking to see whether the site is in operation before attempting a run.[m]

"Temporary sites" are usually located on less heavily traveled roads if safety standards can be observed and if the terrain permits some element of surprise. Checkpoints are established at such sites at irregular intervals. The stopping and inspection procedure is generally the same as that for permanent sites.

The third form of traffic inspection, and the one used in the present case, is the "roving patrol." In this operation, used only on roads with light traffic or when weather conditions preclude a regular traffic checking operation, the officers observe traffic while cruising in a patrol car or while parked at a point where a traffic control signal requires the slowing of vehicles. Depending on the road and on other variables, the officers may stop every vehicle that passes or they may stop vehicles on a random basis. They will ordinarily inspect the trunk of a stopped vehicle.

Statistics furnished by INS show that of the estimated ten million vehicles that passed through permanent and temporary checkpoints in fiscal year 1972, fewer than two million were stopped for questioning of the occupants, and fewer than 400,000 of those vehicles stopped were subjected to an inspection. It is estimated that questioning of occupants

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[m] In an effort to combat such evasion techniques the Border Patrol employs patrols on both sides of the checkpoint and, in appropriate cases, installs electronic detection devices.

consumes an average of slightly more than one minute, while checking the trunk of an automobile takes an average of less than two minutes. Border Patrol officers are authorized only to search for aliens, and we are informed that while on occasion they will look under the body of the car or check under the hood or back seat, ordinarily inspection is limited to a look in the trunk.[23]

The Border Patrol's traffic checking operations have been highly productive. On a service-wide basis in fiscal year 1972, the Patrol located 39,243 deportable aliens through traffic checking operations, of whom 30,124 had entered the United States illegally across the land border at a place other than a port of entry.[24] This represents nearly 10 percent of the number of such aliens located by the Border Patrol by all means throughout the United States.[25]

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[23] It is estimated by INS that only two percent of the vehicles inspected are subjected to a check of the back seat. In most instances, such a check is made because the officer's suspicion is aroused by the appearance of the back panel of the trunk or because he is acting on information. A back-seat check involves only a lifting of the cushion; it causes no damage to the interior of the vehicle.

[24] Most of the remaining 9,119 had either entered illegally at a port of entry or entered legally and violated the conditions of entry.

[25] Traffic checking operations for fiscal year 1972 also netted 2,880 smugglers of aliens. Of the 39,243 deportable aliens located, 11,586 or about one-third were smuggled (*i.e.*, assisted in entry).

The kind of discovery made in the present case occurs with some regularity, although it is not the object of these vehicle

These then are the enforcement problems confronting the Border Patrol; and this is the carefully devised program it follows in attempting to meet those problems. It should be apparent that the traffic checking operations are an essential link in the enforcement chain. Were it not for the permanent and temporary checkpoints and the critical roving patrols, there would be no effective deterrent to the already common smuggling technique of transporting illegal entrants inland in vehicles from points just this side of the border. As a practical matter, once the smuggled aliens were safely in the trunk of an automobile or the back of a van, the Border Patrol would be powerless to intercept the illegal operation and the aliens could easily be intermingled with the inland population. It is not difficult to imagine that with the enforcement program thus emasculated, violators would take full advantage of the weak link. On a Mexican border of nearly 2,000 miles, it would be physically impossible, even with a multifold increase in manpower, for the Border Patrol to restore the lost deterrent by a strengthened line watch.

Given the volume of vehicle traffic and the mobility of autos on the open highways of the southwest, it would be literally impossible to confine the inspection

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inspections. During fiscal year 1972, Border Patrol officers made 670 seizures of marihuana and arrested 790 United States citizens and 237 aliens in connection with those seizures. Though precise figures are not available, it is estimated that about half the seizures were through traffic checking operations.

procedure to cars which there is probable cause to believe are smuggling aliens.[25]

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[25] There are, of course, some differences between the traffic checking here and the enforcement programs in *Camara*, *Colonnade*, and *Biswell*. Those subjected to vehicle checks are not, as in *Colonnade* and *Biswell*, licensed dealers who by accepting a license forfeit some measure of privacy. See *Biswell*, slip opinion p. 6. Nor is the danger here one of hazard to public health and safety as in *Camara* and *See*. But we believe that these are not at the heart of the balancing process and that they do not obscure the essential similarities between the Border Patrol's traffic checks and the routine inspections that this Court has authorized. The basic similarity is the practical need to enforce regulatory programs by periodic or random examination.

The Border Patrol traffic checks qualify as administrative inspections. It is true that there is a variety of criminal offenses involved in the illegal entry and transportation of aliens. *E.g.*, 8 U.S.C. 1324 (harboring, transporting, inducing illegal entry); 8 U.S.C. 1325 (illegal entry); 8 U.S.C. 1326 (reentry of deported or excluded alien); 18 U.S.C. 911 (false representation as citizen); 18 U.S.C. 1546 (misuse of visas, permits, and other entry documents); 18 U.S.C. 371 (conspiracy to commit offense or defraud United States). See generally Gordon and Rosenfield, *Immigration Law and Procedure*, Vol. 2, §§ 9.22-9.40 (rev. ed.). But the Patrol's primary mission has always been to prevent the unlawful entry of aliens into this country, and apprehension of illegal aliens is primarily for the purpose of deportation rather than prosecution. Figures supplied by the INS bear this out. In fiscal year 1972, INS officers located a total of 398,000 aliens who had entered without inspection. Prosecution for illegal entry under 8 U.S.C. 1325 or 1326 was authorized only in some 11,000 cases—less than three percent. Our point here is simply that such traffic checking is sufficiently akin to the administrative or regulatory searches authorized by this Court to be tested by the standards articulated in those decisions.

In sum, the Border Patrol's enforcement problems are indeed peculiar and difficult. The traffic checking operations are an integral and successful part of the total enforcement program, not only in permitting the apprehension of thousands of illegal aliens who would otherwise avoid detection in their effort to move inland, but also in deterring the unlawful entry of countless others for whom the risk of apprehension now appears too great. Without traffic checking, which necessarily involves some stopping of vehicles on a random or universal basis, there would be a large and inviting gap in the Border Patrol's effort to maintain the integrity of our national borders. Thus, these traffic checking operations, like the unannounced inspections in *Biswell*, are "a crucial part" of the enforcement scheme essential to the maintenance of "a credible deterrent" (slip opinion p. 5). There is no practical alternative.

B. The Traffic Checking Operations Authorized By the Statute and Carried Out Under It Do Not Unreasonably Impinge Upon Constitutionally Protected Rights

Effective implementation of congressional policy, we recognize, does not necessarily amount to constitutional justification. Thus, in addition to demonstrating a substantial governmental need for this kind of inspection program, we now turn to a discussion of the impact of the program on constitutionally protected interests.

Section 287(a) of the Immigration and Nationality Act authorizes INS officers to conduct warrantless vehicle inspections for the presence of aliens within

a "reasonable distance" of any external boundary of the United States. 8 U.S.C. 1357(a)(3). Regulations promulgated under the statute define "reasonable distance" to mean "within 100 air miles from any external boundary * * * or any shorter distance which may be fixed by the district director." 8 C.F.R. 287.1(a)(2).[26]

In applying the Fourth Amendment's standard of reasonableness to determine the validity of this statute, the Court should understand not only its historical genesis but also its mode of implementation. Despite the apparently unlimited authority the language of the statute seems to convey to board and search within a "reasonable distance" of the border, the statute has never been understood to permit arbitrary searches and has not been used as a pretext to search for evidence of other criminal conduct. Thus, the establishment of checkpoints within the 100-mile maximum fixed by regulation, 8 C.F.R. 287.1(a)(2), is based upon a consideration of various factors designed to accomplish the statutory objective with the least possible intrusion upon the privacy of travelers (see *supra*, pp. 23-25).[27]

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[26] Any vehicle stop or inspection conducted by INS officers outside the 100-mile limit must, therefore, be justified on the same basis as any other investigatory stops. See, *e.g.*, *United States* v. *Saldana*, 453 F. 2d 352 (C.A. 10); *United States* v. *Granado*, 452 F. 2d 769 (C.A. 10), both involving investigatory stops at a turnpike tollgate in Oklahoma, some 800-900 miles from the Mexican border.

[27] Though it relates by its terms only to the district director's decision to shorten the "reasonable distance," we are informed

Hence, as illustrated by the present case, the INS has not claimed and would not claim statutory or constitutional authority to make random vehicle inspections for aliens in Times Square or in front of the Lincoln Memorial, even though technically these points are within 100 air miles of an external border. There is, quite simply, not a sufficient need for such operations to justify the inconvenience they would cause, and thus they would be "unreasonable" in the constitutional sense. See *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 534-535; *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-21. But vehicle checks conducted in areas where the incidence of illegal entry and alien smuggling is high are, if executed in good faith and with minimum inconvenience to the traveling public, reasonable within the Fourth Amendment.

As we have seen, the broad test of reasonableness is settled: whether the governmental interest justifies the intrusion upon privacy. This requires a balancing of "the need to search against the invasion which the search entails." *Camara*, *supra*, 387 U.S. at 534-535, 536-537. Among the considerations that have entered into the balance in prior decisions are the public interest being served, the availability of alternative enforcement techniques, the history and tradition of

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that 8 C.F.R. 287.1(b) states as well the considerations that are weighed in determining the location of checkpoints. These are: "topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States * * *." See p. 8, *supra*.

the regulatory authority, the character of the search (*i.e.*, of the person, residence, business premises, or automobile), the scope of the search, the objective of the search (*i.e.*, primarily criminal or administrative), the extent of the resulting inconvenience, and the existence of statutory authority for the activity. Tested by these considerations, we submit the Border Patrol's traffic checks qualify as reasonable.

We have already discussed at pp. 17-21 the history of entry restrictions and border search authority. They are deeply rooted in the nation's sovereign right to protect the integrity of its borders against the unauthorized entry of persons and things. We have here as in *Biswell* "large interests" at stake, which as in *Camara* and *Colonnade* have traditionally been protected by regulation and close supervision.

On the other side of the balance, the traffic checks create only a relatively minor inconvenience for travelers. Because the vehicle inspections are narrowly confined in scope and objective, they involve an intrusion into privacy which, though hardly negligible, should be regarded as tolerable. As we stated earlier, only about one vehicle in five that pass through Border Patrol checkpoints is stopped at all. Of these, about 80 percent are detained for one minute while the officer asks questions of the occupants, and the remaining 20 percent are detained an additional minute for an inspection of the vehicle. In most instances that inspection involves no more than a look in the trunk of the automobile. At most, it may include

a look under the car, beneath the hood,[28] or under the back-seat cushion. The statute authorizes only searches for aliens, and the officers may not look anywhere that a person could not be concealed.[29] Thus, there may be no search of the glove compartment, or of ordinary suitcases, handbags, or containers, and the officers may not conduct a search of the persons of the occupants (except as may be justified under the established standards of *Terry* v. *Ohio*, *supra*).

Moreover, what is involved in one of these strictly limited inspections is a vehicle, not a person as in *Terry*, or a residence as in *Camara*, or even a business establishment as in *See*, *Colonnade*, and *Biswell*. This Court "has long distinguished between an automobile and a home or office." *Chambers* v. *Maroney*, 399 U.S. 42, 48. See *Carroll* v. *United States*, 267 U.S. 132, 153; *Preston* v. *United States*, 376 U.S. 364, 366-367; *Cooper* v. *California*, 386 U.S. 58, 59. Even a complete search of an automobile and all its contents is ordinarily a milder intrusion into one's privacy than a search of the home or office, since the expectation of privacy in an automobile on a public highway is less. Cf. *Katz* v. *United States*, 389 U.S.

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[28] For a case where an alien was found doubled up under the hood of an automobile, see *United States* v. *Ruiz-Juarez*, 456 F. 2d 1015 (C.A. 9).

[29] See *Valenzuela-Garcia* v. *United States*, 425 F. 2d 1170 (C.A. 9), where evidence found behind fender panels in the trunk of an automobile was excluded because an alien could not have hidden in that spot. See also *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (C.A. 10).

347. Here the inspection is substantially less intrusive than a complete search.[20]

As implemented by the INS, the broad language of the statute has not proven to be a source of abuse. Based on such factors as topography, prior experience, and reliable information, the decision on establishment of checkpoints seeks to maximize the likelihood of detecting illegal aliens while minimizing inconvenience to the public. While the decision to check a particular vehicle is in part a discretionary one, experienced Border Patrol officers rely in large measure upon objective factors that have proven to be reliable indicia of illegal alien activity (see note 20, *supra*). Though we are informed that these vary from area to area, and are for the most part passed on by word-of-mouth, bulletins are issued to bring to the officers' attention a new smuggling technique or a recently successful enforcement practice.

Finally, the Border Patrol's traffic checking operations are conducted pursuant to specific statutory authority. This Court's observation with respect to inspection of the liquor industry in *Colonnade* is no less applicable to the nation's enforcement of its immigration restrictions: "Congress has broad author-

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[20] Petitioner's reliance upon the statement in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 479, that the "stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants," is misplaced. The search in *Coolidge* was an intensive one (indeed, the evidence found included gun powder taken from vacuum sweepings), and the objective was to uncover evidence of crime.

ity to fashion standards of reasonableness for searches and seizures." 397 U.S. at 77. In *Biswell*, the exercise of that power by Congress was of critical importance in assessing the reasonableness of the challenged search (slip opinion pp. 5, 6). Here as in *Biswell* the Congress has exercised its authority to fashion a standard of reasonableness. It has judged that random or universal inspections of vehicles are essential to an effective enforcement program.[21] The congressional judgment, amply supported by the realities of Border Patrol experience, is entitled to respect. The conclusion in *Biswell* is thus the appropriate conclusion here as well (slip opinion p. 6):

> We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.[22]

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[21] That Congress has made such a judgment with respect to the illegal entry of aliens and not with respect to contraband does not reflect a view that the public interest in excluding aliens is greater than that in excluding contraband, as suggested by the dissenting judge below (A. 28). More likely, it is based on a recognition that the enforcement problem is a different one and the inspection that would be necessary to uncover contraband in a vehicle would be a far more offensive one.

[22] The three courts of appeals that have passed on the issue have thus concluded that the statute here is a valid exercise of congressional authority under the Fourth Amendment, and that the Border Patrol's traffic checking operations are a valid

Even if random vehicle inspections without probable cause or suspicion regarding particular cars do not involve excessive interference with the constitutional right to privacy, there remains the question whether some sort of warrant system should circumscribe the program. It is our position that no warrant system can be constructed that would be feasible and meaningful.

Unlike the setting in *Camara*, we are concerned here with movable vehicles possibly concealing live human beings, and not with fixed dwellings containing possible defects not easily concealed or corrected in a short time. It would be clearly impracticable, even if manpower permitted, for an officer to seek out a magistrate each time he is refused access to the trunk of an automobile he has stopped. The traditional problems associated with delay in searching automobiles,[35] are compounded by the fact that the

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exercise of the statutory authority. See *Kelly* v. *United States*, 197 F. 2d 162 (C.A. 5) (dealing with the 1946 language); *United States* v. *DeLeon*, C.A. 5, No. 72-1052, decided June 6, 1972; *United States* v. *McDaniel*, C.A. 5, No. 71-2810, decided May 11, 1972; *Fernandez* v. *United States*, 321 F. 2d 283 (C.A. 9); *Barba-Reyes* v. *United States*, 387 F. 2d 91 (C.A. 9); *Elder* v. *United States*, 425 F. 2d 1002 (C.A. 9); *United States* v. *Miranda*, 426 F. 2d 283 (C.A. 9); *United States* v. *Avey*, 428 F. 2d 1159 (C.A. 9), certiorari denied, 404 U.S. 903; *Fumagalli* v. *United States*, 429 F. 2d 1011 (C.A. 9); *Duprez* v. *United States*, 435 F. 2d 1276 (C.A. 9); *United States* v. *Marin*, 444 F. 2d 86 (C.A. 9); *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (C.A. 10).

[35] "[T]he car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." *Chambers* v. *Maroney*, 399 U.S. 42, 51.

very objects of the inspection are live and mobile. In addition, since the inspections typically take place out on the highways any attempt to secure a specific court order against a driver who balked at an inspection would occasion a seriously lengthy delay for the traveler.

Nor are there practicable alternatives. Even if it were feasible to have a magistrate stationed at each permanent and temporary checkpoint, so that he could pass upon each case on the spot and without delay, his function necessarily would be either the mechanical one of authorizing the inspection in every instance or the thorough reevaluation of the administrative decision to operate the checkpoint at the particular time and place. The Court in *Camara* found a warrant procedure appropriate precisely because a neutral magistrate could perform an appropriate function *without* undertaking "any reassessment of the basic agency decision to canvass an area" (387 U.S. at 532). There he could determine whether inspection of the particular premises would be justified in terms of the standards for the canvass itself, he could fix the limits of the inspection, and he could certify the inspector's authority to enter the dwelling (*id.*, at 532, 538). None of those factors applies to the random inspection of an automobile for the presence of aliens, conducted by a uniformed Border Patrol officer.

The historic aversion to general warrants, as embodied in the Fourth Amendment, and the Court's decision in *Camara* that a magistrate should not

review the basic agency decision to canvass an area, indicate that a "warrant" approving the overall inspection program would not be a proper or useful judicial action. Hence, the interposition of a magistrate, even if it were feasible, could not add any significant protection in an otherwise reasonable inspection program.

For the foregoing reasons, we urge the Court to hold that Section 287 of the Immigration Act, as construed and implemented administratively, comports with the reasonableness standard of the Fourth Amendment. If the Court agrees with this position, the remaining issue in the case is whether the search of petitioner's car was conducted as part of a valid inspection program meeting the standards we have discussed. To that question, we now turn.

III

THE INSPECTION OF PETITIONER'S AUTOMOBILE WAS A PROPER PART OF A REASONABLE TRAFFIC CHECK

Apart from his attack on the validity of the statute and the random traffic-check program, we do not understand petitioner to challenge the administrative decision to patrol the particular road, or the decision of the Border Patrol officers to check his vehicle, or the scope or good faith of the inspection that was performed. We therefore limit our discussion here to a brief description of the road and of the enforcement practices on it. This review of the record will demonstrate that the roving traffic check which led

to the discovery of 161 pounds of marihuana in petitioner's car was reasonable.

On that portion of State Highway 78 that runs north-easterly between Brawley and Blythe, California, traffic is light and the Border Patrol does not maintain permanent or temporary checkpoints.[24] It is one of several secondary roads in southeast California carrying traffic northbound from the vicinity of the Mexican border that do not have regular checkpoints. Thus, it was known that smugglers of aliens frequently choose it as their route inland in order to avoid the risk of checks on the other north-south highways. For this reason roving patrols are regularly operated on the road.[25]

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[24] The checkpoint involved in *Fumagalli* v. *United States*, 429 F. 2d 1011 (C.A. 9), is not, as petitioner suggests (Br. 11 n. 1), only one mile from the spot where his vehicle was stopped. The "Trifolium" site, which is located in that portion of Highway 78 that runs parallel to the border west of Brawley, is some 40 miles west of the spot where petiioner was stopped.

[25] We are informed that the road is patrolled during an average of one working shift out of four, usually during midnight to 8:00 A.M. On a year-round basis, only about ten vehicles per hour use the highway during that "graveyard" shift, and at certain times of the year there may be only five or six vehicles altogether from midnight to daylight. During the night hours the patrolling officers frequently check every car that passes. We are advised that in fiscal year 1972 these Highway 78 roving patrols alone located 195 smuggled aliens, nearly two percent of all those located by Border Patrol traffic checks. During the same period there were five narcotics seizures involving 1,227.6 pounds of marihuana valued at $122,760.

Petitioner was stopped going north toward Blythe. Having determined that petitioner was a resident alien, the officers checked under the back-seat cushion for aliens and found instead the evidence here at issue. There is no question of the officers' good faith in this respect; they knew by word-of-mouth, and it had been confirmed in a recent bulletin from Border Patrol headquarters, that alien smugglers were adapting the back seats of automobiles to accommodate aliens behind the seat rest.[26]

The roving patrol on Highway 78 was and is an important supplement to the checkpoints maintained on the more heavily traveled roads nearby. The stop of petitioner's automobile was in accordance with normal roving patrol practices, and the resulting inspection was within the permissible scope of checks for aliens. Since the officers therefore acted reasonably and in accordance with established Border Patrol procedures, there is no basis for excluding the evidence that was uncovered in the process. See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217, 238; *United States* v. *Schafer*, C.A. 9, No. 71-1004, decided June 5, 1972; *United States* v. *Lopez*, 328 F. Supp. 1077, 1099 (E.D. N.Y.). The court below properly so held.

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[26] INS estimates that about two percent of the vehicles inspected in traffic check operations are checked for aliens under the back seat. See note 22, *supra*.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals sustaining petitioner's conviction should be affirmed.

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AUGUST 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 474158 75

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III. THIS COURT MUST IN ACCORD WITH ITS CONSTITUTIONAL DUTY TO ANNUL STATUTES AND REGULATIONS VIOLATIVE OF THE CONSTITUTION, STRIKE DOWN THIS UNWARRANTED GOVERNMENTAL BID FOR LEGISLATUM AS IMPLEMENTED BY GOVERNMENTAL REGULATIONS RESCINDING THE SEARCH AND SEIZURE RIGHTS OF OUR CITIZENS, DENYING THEM EQUAL PROTECTION OF THE LAWS, ABRIDGING THEIR RIGHT TO TRAVEL, CONFRONTING THEM INTO THE MENACE OF MIDDLE AMERICA, DESTROYING LAW ABIDING MIDDLE AMERICANS FROM SEEKING EMPLOYMENT OR ENJOYING VACATIONS NEAR OUR NATION'S BOUNDARIES, AND OBSTRUCTING FREEDOM OF INTERSTATE COMMERCE.

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Attorney, Luke McKissack hereby respectfully moves for leave to file the attached brief Amicus Curiae in support of Petitioner in this case. The undersigned is a member of the bar of this court, who has previously appeared as Amicus Curiae on several occasions such as the recent McGautha v. California death penalty case (402 U.S. 183, 91 S. Ct. 1454 (1971), and has argued before this body in Gilbert v. California, (388 U.S. 263, 87 S. Ct. 1951 (1967)) and United States v. Freed & Sutherland (401 U.S. 601 91 S. Ct. 1112 (1971)).

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The Oceanside division of the California Highway Patrol indicated that upwards of 25,000 automobiles per day travel northward through the United States Border Patrol checkpoint in question in Barron. Over one month's time, approximately 700,000 persons find themselves in the situation presented in Barron, i.e., subject to exploratory searches totally

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We are further presenting novel arguments not included in Petitioner's Opening Brief, which could prove helpful in arriving at a final determination of the important issues involved. The Solicitor General has a copy of our brief and has until August 18, 1972, within which to reply to Petitioner's Opening Brief which has not yet been printed.

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I

THE EXCEPTION ALLOWING WARRANTLESS SEARCHES WITHOUT PROBABLE CAUSE UNDER 8 UNITED STATES CODE § 1357(a) AND DEFINED BY REGULATION 8 C.F.R. § 287.1(a) (2) CONTRAVENES PROTECTIONS AFFORDED BY THE FOURTH AMENDMENT.

We are faced with a rule in the United States 9th Circuit Court of Appeals, which stands in conspicuous opposition to the constitutional protections generally provided by the Fourth Amendment. Those protections threatened by this rule are based on probable cause, are "...per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well delineated exceptions" (Katz v. United States, 389 U.S. 347, 357 88 S. Ct. 507, 514, [1967]). The exception challenged here is not well delineated, nor have the cases demonstrated any rational grounds behind its establishment.

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A. NO APPARENT REASON EXISTS WHY FOURTH AMENDMENT PRINCIPLES DO NOT APPLY WITH THE SAME FORCE TO SEARCHES OF AUTOMOBILES FOR SMUGGLED ALIENS AS THEY DO TO SIMILAR SEARCHES FOR SMUGGLED MERCHANDISE. THE LOWER COURT ERRED IN BASING ITS RULING UPON THIS DISTINCTION.

Petitioner contends that absent any showing that 1. an international boundary was crossed, and 2. that he fled the border inspection or was under surveillance, the search without probable cause was not, and cannot be legitimized as a border search. Under the authority of 18 U.S.C. 1357, Immigration and Naturalization Service officers have the right to search automobiles for illegal aliens within a reasonable distance of an international border to prevent the illegal entry of aliens provided there is probable cause for so doing.

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Cervantes v. United States, 263 F.2 800 (9th Cir. 1959). However, once it has been established that an individual has previously crossed an international border and is not presently under surveillance or pursuit, a search conducted seventy miles from the Mexican border, as in the case at bar, does not constitute a border search and is not justified absent probable cause. Thus, the Ninth Circuit Court of Appeals has held that the search of an automobile seventy miles from the nearest port of entry cannot be justified as a border search, but must be supported by probable cause. Cervantes v. United States, supra. In the Cervantes case, a Federal customs investigator for the United States Customs Service had received information on two occasions from an informant describing the defendant and his several entries into Mexico for purchases of narcotics. Moreover,

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> "An authorized federal border official may, upon unsupported suspicion, stop and search persons and their vehicles entering this country. 19 U.S.C.A. Sec. 482. Carroll v. United States, supra, 267 U.S. at pages 153-154, 45 S. Ct. at page 285. But after entry has been completed, a search and seizure can be made only on a showing of probable cause. Landau v. United States, 2 Cr., 82 F.2d 285, 286; United States v. Lee Ngee How, D. C. 105 F. Supp. 517, 523. The record does not reveal the elapsed time between Cervantes' re-entry into the

conviction for lack of probable cause to stop and search defendant's vehicle at San Clemente, included the following remarks in a footnote regarding the Government's contention that the court could sustain the search as a border search:

"An authorized federal border official may, upon unsupported suspicion, stop and search persons and their vehicles entering this country. 19 U.S.C.A. Sec. 482. Carroll v. United States, supra, 267 U.S. at pages 153-154, 45 S. Ct. at page 285. But after entry has been completed, a search and seizure can be made only on a showing of probable cause. Landau v. United States, 3 Cir., 82 F.2d 285, 286; United States v. Lee Mgee How, D. C. 105 F. Supp. 517, 522. The record does not reveal the elapsed time between Cervantes' re-entry into the

United States on December 8, 1955, and his arrest at San Clemente. However, we take judicial notice of the fact that San Clemente is more than seventy miles from the nearest port of entry from Mexico. There is no indication in the record that Cervantes had stopped at San Clemente in connection with a pursuit. Insofar as the record reveals, therefore, his entry had been completed prior to the time he reached San Clemente, and the government does not contend otherwise." Cervantes v. United States, 263 F.2d 800, 803, n.5. [Emphasis added.]

It is submitted that in the case at bar, absent independent probable cause for detaining and searching defendant's vehicle, any evidence sought to be introduced be suppressed as not incident to a valid international border search. See, also,

United States on December 8, 1955, and his arrest at San Clemente. However, we take judicial notice of the fact that San Clemente is more than seventy miles from the nearest port of entry from Mexico. There is no indication in the record that Cervantes had stopped at San Clemente in connection with a pursuit. Insofar as the record reveals, therefore, his entry had been completed prior to the time he reached San Clemente, and the government does not contend otherwise."

Cervantes v. United States, 263 F.2d 800, 803, n.3. (Emphasis added.)

It is submitted that in the case at bar, absent independent probable cause for detaining and searching defendant's vehicle, any evidence sought to be introduced be suppressed as not incident to a valid international border search. See, also,

United States v. Hortze, 179 F. Supp. 913, 918 (D.C. Calif. 1959). To conclude otherwise, not only the Petitioner, but all persons who travel northwest to other parts of California would by virtue of travelling on Highway 78 or all major highways, surrender their Constitutional protection against unreasonable searches and seizures; and this is true whether or not the persons involved ever crossed the border. Such an argument is certainly fatuous and invalid. Justice Browning, in his dissenting opinion in the case at bar, vehemently shares our continuing confusion over the attempt to distinguish between searches for contraband and searches for aliens.

> "If a reason exists for distinguishing searches for aliens from searches for merchandise, no one - including this court-has yet suggested what it might be. Nothing in the words of the

United States v. Portes, 179 F. Supp. 913, 914 (D.C. Calif. 1959). To conclude otherwise, not only the petitioner, but all persons who travel northwest to other parts of California would by virtue of traveling on Highway 78 or all major highways, surrender their Constitutional protection against unreasonable searches and seizures; and this is true whether or not the persons involved ever crossed the border. Such an argument is certainly specious and invalid. Justice Browning, in his dissenting opinion in the case at bar, vehemently shares our continuing confusion over the attempt to distinguish between searches for contraband and searches for aliens.

"If a reason exists for distinguishing searches for aliens from searches for merchandise, no one - including this court - has yet suggested what it might be. Nothing in the words of the

Constitution supports the distinction, and no one suggests that the public interest in excluding inadmissible aliens is greater than that in excluding narcotics and other contraband" United States v. Almeida-Sanchez, 452 F.2d 459 (1971)

We, therefore, continue to assert the applicability of Fourth Amendment protections to the present case, despite the absurd application of 8 U.S.C. §1357(a) which threatens to deny those protections. If the rational distinction which Judge Browning as well as Petitioner fail to find, exists, we demand to know what it is before abandoning the assertion of rights Constitutionally protected by the Fourth Amendment.

II

THERE IS NO RATIONAL JUSTIFICATION FOR ALLOWING 8 U.S.C. § 1357(a) TO SERVE AS A BLANKET EXCEPTION TO THE FOURTH AMENDMENT REQUIREMENT OF PROBABLE CAUSE.

In further stressing the absurdity of 8 U.S.C. § 1357(a) which allows warrantless searches without probable cause, appellant urges the court to note that the judicial trend is in the opposite direction, ie., toward a narrowing of exceptions which allow warrantless searches toward strict enforcement of the probable cause requirement; and to a narrowing of the scope of searches to eliminate the obtrusive "exploratory" search.

For example, Coolidge v. New Hampshire, (1971) 403 U.S. 443, 91 S. Ct. 2022, limited the Chambers rule which allowed warrantless searches of vehicles (with probable cause) in motion when seized. This undeniably

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represents the court's wish to limit the exception of the "movable auto" exigency. Yet, under 8 U.S.C. § 1357, and under the guise of a search for "aliens", any auto within 100 miles of an external boundary could be searched without a warrant in possible violation of Coolidge, and without probable cause in violation of the Supreme Court mandate in both Coolidge and Chambers. Section 1357 potentially renders such cases meaningless.

Further, the probable cause requirement has been held subject to limitations dictated by alleged criminal activity, and by the "reasonable" expectations of the officers under the circumstances. In People v. Superior Court (Kiefer), 3 Cal. 3d 807, 91 Cal. Rptr. 729 (1970), the Court stated that even when there is probable cause to arrest, a search for weapons must remain "reasonable in scope".

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"Just as the arresting officer in an ordinary traffic violation case cannot reasonably expect to find contraband in the offender's vehicle, so also he cannot expect to find weapons. To allow the police to routinely search for weapons ... would likewise constitute an 'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile. It follows that a warrantless search for contraband must be predicated ... on specific facts or circumstances giving the officer reasonable grounds to believe that such weapons are present in the vehicle he has stopped." [3 Cal. 3rd at 829, 91 Cal. Rptr. at 744].

Indeed, very recently in California, the limitation of scope of search incidental to arrest articulated in Chimel v.

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California (1969) 395 U.S. 752, 89 S. Ct. 2034 has been applied to searches of automobiles. (People v. Koehn, 102 Cal Rptr. 102, May 1972). These decisions dictate that a search without a warrant can be conducted in a non-emergency situation, only if the search coincides with a lawful arrest or detention and is restricted to the arrestee's person or area "within his immediate control (395 U.S. at 762-3). Yet, under § 1357, no warrant is required, no probable cause, no lawful arrest and no restriction of scope of search. One has only to "look for" aliens, and the Fourth Amendment protections supported by the above decisional law, vanish.

Other cases have limited the use of "furtive gestures" as a basis for probable cause to search. (Gallik v. Superior Court of Santa Clara County, 5 Cal. App. 3d 862, 97 Cal Rptr. 693 (1971); People v. Cassel,

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23 Cal App 3d 715, 100 Cal Rptr, 520 (1972) People v. Williams, 20 Cal App. 3d 590, 97 Cal. Rptr. 815 (1971). That limitation is meaningless if the probable cause requirement is abandoned.

Finally, the courts in California for example, have tried to put a halt to the more obvious abuses of the authority of the police to "inventory" the contents of automobiles lawfully in their custody pursuant to the removal and storage provisions of the vehicle code. [Mozzetti v. Superior Court, 4 Cal App. 3d 699, 94 Cal. Rptr. 412 (1971); see also, People v. Heredia, 20 Cal. App. 3d 194, 97 Cal. Rptr. 488 (1971) [Mozzetti rule not merely prospective in effect]; Virgil v. Superior Court, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968)].

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grounds for diluting Fourth Amendment protection merely for "inventory" purposes.

The court in Koehn, quoted the following from Mr. Justice Stewart's opinion in Coolidge:

> "...the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." (Coolidge v. New Hampshire, supra, 91 S. Ct. 2022, 2035).

Following Mozzetti, the "inventory" may no longer serve as the catalyst disintegrating the Fourth Amendment protections. Unfortunately one such "talisman" remains: the word "alien". Petitioner strongly denies existence of any rationale for this exception. He rightfully demands an explanation before he submits to what can now only be termed a blatant disregard of his Fourth Amendment rights under the constitutionally invalid mandate

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* The 9th Circuit Court of Appeals has itself, made inroads on the carte blanche justification for even border searches. See Henderson v. United States (9th Cir. 1967) 390 F.2d. 805 (probable cause essential to support search of body cavities).

III

THIS COURT MUST IN ACCORD WITH ITS CONSTITUTIONAL DUTY TO ANNUL STATUTES AND REGULATIONS VIOLATIVE OF THE CONSTITUTION, STRIKE DOWN THIS UNWARRANTED GOVERNMENTAL BID FOR LEBENSRAUM AS IMPLEMENTED BY GOVERNMENTAL REGULATIONS RESCINDING THE SEARCH AND SEIZURE RIGHT OF OUR CITIZENS, DENYING THEM EQUAL PROTECTION OF THE LAWS, ABRIDGING THEIR RIGHT TO TRAVEL, COMPRESSING THEM INTO THE REFUGE OF MIDDLE AMERICA, DETERRING LAW ABIDING MIDDLE AMERICANS FROM SEEKING EMPLOYMENT OR ENJOYING VACATIONS NEAR OUR NATION'S BOUNDARIES, AND OBSTRUCTING FREEDOM OF INTERSTATE COMMERCE.

It has been clear since Marbury v. Madison, 1 CRANCH 137 (1804) that Congress can neither make nor enforce a law, rule, or regulation which is counter to the United States Constitution. This principle is the bedrock of our form of Government, yet Congress and State legislatures and administra-

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the bounds of our Constitution. It is the Judiciary's duty to be watchful for citizen's constitutional rights. Boyd v. United States 116 U.S. 616, 6 S. Ct. 524 (1886). When a person brings a proper case complaining of infringements of constitutional rights, the judicial branch of our Government must ascertain the validity of suspect laws passed by our legislative bodies, and at least as great a duty exists when administratively passed regulations are challenged. Individuals must be protected from both willful and unwitting encroachment upon their constitutional rights. "This duty cannot be discharged as though it were a mere procedural formality." Von Moltke v. Gillies, 332 U.S. 78, 68 S. Ct. 316 (1948). It must be thoroughly and thoughtfully considered. Here, by the stroke of a pen, the Government has eliminated Fourth Amendment protections for a majority of our 200

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million citizens. (See Appendix A). One of the laws here in question, 8 U.S.C. 1357 (a), allows searches of vessels and vehicles for aliens with no need of obtaining a search warrant and without even probable cause, as long as within a "reasonable distance" of an external boundary. Implementing this law is 8 C. F. R. 287.1(a) (2), which defines "reasonable distance" as 100 air miles from any external boundary. Recent cases have accepted these laws more by rote than by reason. An example is the pending case.

Here, the court must not only analyze the ends of the 8 U.S.C. 1357(a) and 8 C.F. R. 287.1(a)(2) but must also examine their means to determine if they comport with constitutional standards.

In similar legislation, 19 U.S.C. 482, Congress literally authorized searches for foreign contraband anywhere in the United States without either a search

warrant or probable cause. The courts, doing their duty, have understandably balked at such broad authorization and have required probable cause to search unless it is a border search. Cervantes v. United States (9th Cir. 1959) 263 F.2d. 800.

If these rules are upheld, the people of the following cities, Seattle, San Francisco, Los Angeles, San Diego, Phoenix, San Antonio, Houston, New Orleans, Miami, Baltimore, Philadelphia, Pittsburg, New York, Buffalo, Cleveland, Columbus, Detroit and Washington, D. C.; (cities in excess of 500,000 people) plus the entire population of the states of Florida, Delaware, New Jersey, Connecticut, Rhode Island, Maine, New Hampshire, Vermont and Hawaii, 59 million people, can be stopped and their vehicles searched without probable cause, and as the law is stated, without any justification. If we were to further include cities of less than one-half

million people, we would learn that the preponderant majority of Americans are subject to the loss of their search and seizure rights under existing legislation. (See Appendix A).

The right to be free from unreasonable searches and seizures, is inextricably interwoven into the fabric of our society. Yet, the Government has arbitrarily chosen, 100 miles from an external boundary as a "no Fourth Amendment Rights" zone. In this zone, Government agents can take away Fourth Amendment protections when riding in vehicles.

Chief Justice Taft in Carroll v. United States, 267 U.S. 132, 153-154, 45 S. Ct. 280, 285 (1925) said:

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"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding

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Furthermore, 8 U.S.C. 1357(a) and 8 C.F.R. 287.1(a)(2) read together, run afoul of the Equal Protection provisions of the Fifth Amendment. Distance from the beach or any other external boundary should not be a criterion for determining the extent of one's constitutional rights. The residents of Miami cannot be afforded lesser constitutional rights than the

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Furthermore, 8 U.S.C. 1357(a) and 8 C.F.R. 287.1(a)(2) read together, run afoul of the Equal Protection provisions of the Fifth Amendment. Distance from the border or any other external boundary should not be a criterion for determining the extent of one's constitutional rights. The residents of Miami cannot be afforded lesser constitutional rights than the

residents of Kansas City. It amounts to an "invidious discrimination" of the most rank sort. See e.g. McLaughlin v. Florida, 379 U.S. 184, 190, 194, 85 S. Ct. 283 (1964); Douglas v. California, 372 U.S. 353, 356, 83 S. Ct. 814 (1963); Skinner v. Oklahoma, 316 U.S. 535, 541, 62 S. Ct. 110 (1942). These laws also inhibit the right to travel. Travel restrictions within the United States were struck down long ago. In Kent v. Dulles, 357 U.S. 116, 125-126, 78 S. Ct. 1113, 1118, (1958). Mr. Justice Douglas stated for this court:

> "The right to travel is a part of the 'liberty' of which citizens cannot be deprived without the due process of law under the Fifth Amendment...In Anglo-Saxon Law, that right was emerging at least as early as the Magna Carta..Freedom of movement across frontiers in either

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direction, and inside frontiers as well, was a part of our heritage. ...travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values."

Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659 (1964), Zemel v. Rusk, 381 U.S. 1, 85 S. Ct. 1271 (1965).

Mr. Justice Stewart reiterated the fundamental nature of the right in United States v. Guest, 383, U.S. 745, 757-758, 86 S. Ct. 1175, 1778 (1966):

"The constitutional right to travel.. occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.

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In any event, freedom to travel throughout the United States has long been recognized as a basic right under the Constitution."

In the landmark decision of Shapiro v. Thompson, 394 U.S. 618, 629-630, 89 S. Ct. 1322, 1329 (1969), Mr. Justice Brennan declared for the majority:

"This court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the Passenger Cases, 7 How. 283, 492, 12 L. Ed. 702 (1849)."

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Clearly in the present case, the government has unreasonably, and without justification, burdened the right to travel. See also Edwards v. California, 314 U.S. 160, 62 S. Ct 164 (1941), Aptheker v. Secretary of State, 378 U.S. 500, 84 S. Ct. 1659 (1964), Zemel v. Rusk, 381 U.S.1, 85 S. Ct. 1271 (1965). The regulations here in question will put a chill on the choice of where to travel. If every midwesterner feared the possibility of searches at any time without probable cause, he would certainly be deterred from traveling to or near any external boundary. "Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Katz v. United States, 389 U.S. 347, 359, 88 S. Ct. 507, 515 (1967). It has therefore, been undeniably established that the right to travel is a "fundamental" constitutional right. We recognize that freedom of travel,

like freedom of speech, may be subject to reasonable limitations as to time and place. The government, if not the Court, may take comfort in the fact that existence of a "compelling governmental interest" necessary to justify infringement of a fundamental constitutional right finds precedent in the notorious, if not celebrated case of Korematsu v. United States, 323, U.S. 214, 65 S. Ct. 193 (1944). Though the Court has been understandably reluctant to refer to Korematsu, the case held that:

> "The liberty of every American citizen freely to come and go must frequently, in the face of sudden danger, be temporarily limited or suspended." (323 U.S. at 231), See also Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375 (1943). Here was justification for the internment of thousands of Japanese, 80% of whom were American citizens by birth. Where is the 'sudden danger'

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which could justify the present restriction? A rising crime rate? The war in Vietnam? Very obviously, no exigency exists as justification.

Further, Mr. Justice Roberts dissented in Korematsu from what he considered too broad a restriction on the right to travel. At least a temporal limitation was inherent in that situation. The right to travel under a literal reading of § 1357 (a), on the other hand, is restricted indefinitely. The overbreadth of § 1357(a) and lack of a compelling governmental interest to justify the blatant infringement of the fundamental right to travel, demand that it be ruled unconstitutional.

This inhibiting of the right to travel also has interstate commerce implications. The chilling effect will dissuade people from traveling from mid-America states to border states, thus decreasing the flow

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of commerce and impairing the commercial viability of, for example, motels, restaurants, and gas stations along interstate routes. See Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S. Ct. 348 (1964).

If the Government's contention is that the border is too difficult to police and therefore the inland check points are needed, then the regulation should surely be struck down. Inefficiency can never be traded off against constitutional rights. Furthermore, there is no showing that the checkpoint in question is essential to patrolling the California-Mexican border for aliens or contraband.

The potential for abuse is plain. By intoning the words, "I'm looking for aliens" immigration officials can vaporize Fourth Amendment rights. The court must thoroughly examine 8 U.S.C. 1357(a) and 8 C.F.R. 287.1

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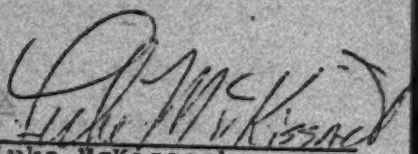
The blatant displacement of Constitutional rights caused by 8 U.S.C. 1357(a) and 8 C.F.R. 287.1(a) (2), and the paucity of compelling Governmental interests require invalidation of these two regulations and the reversal of Appellant's conviction.

Luke Nicklasack

Conclusion

Petitioner's conviction should be reversed.

Respectfully submitted,



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APPENDIX "A"

The Government's position requires that either the majority of the residents of our great nation be kept ignorant of the loss of their Constitutional guarantees or commence a mass exodus to middle-America to reclaim them.* Dodge City may in truth again become the bastion of law and order. It would seem that such a mass evacuation of the people seems unjustified by the whimsical need to maintain border checkpoints 100 miles away from our borders.

Refer to illustration A for a graphic rendering of those persons potentially

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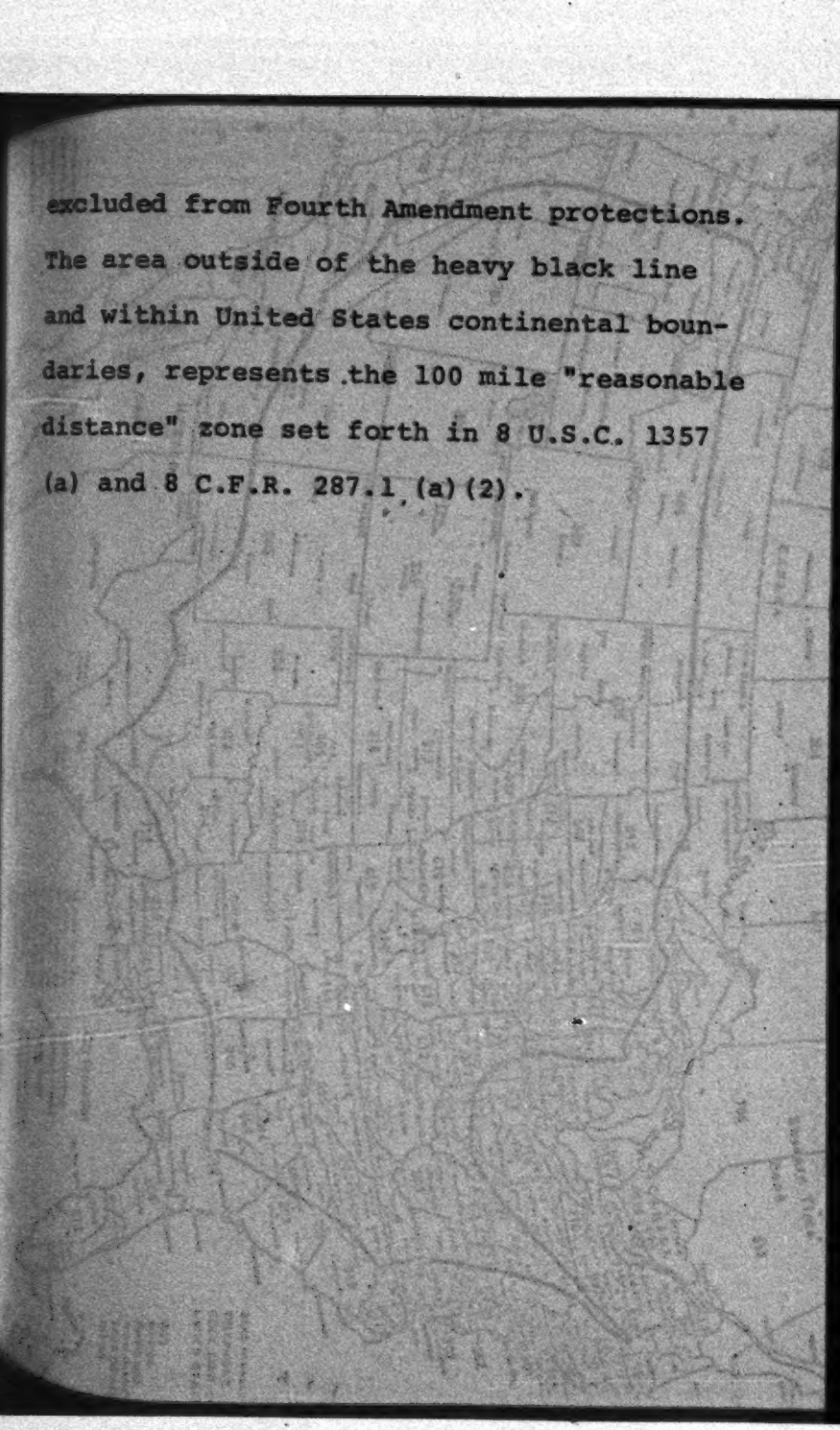
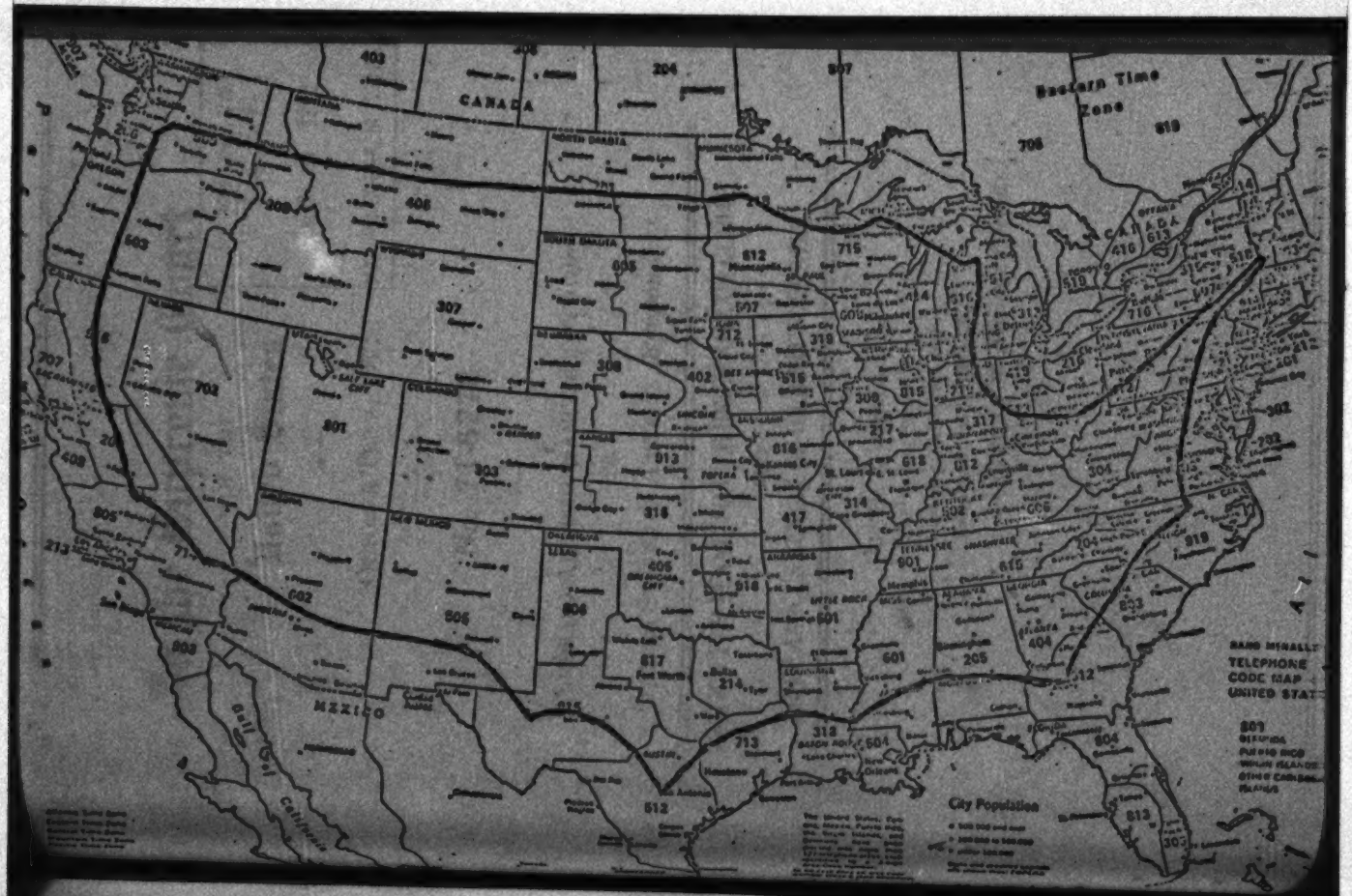


excluded from Fourth Amendment protections. The area outside of the heavy black line and within United States continental boundaries, represents the 100 mile "reasonable distance" zone set forth in 8 U.S.C. 1357 (a) and 8 C.F.R. 287.1 (a)(2).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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-6278

CONDRADO ALMIEDA-SANCHEZ, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF GILBERT FOERSTER

Gilbert Foerster respectfully moves for leave to file the attached brief *Amicus Curiae.*

Consent to such filing has been requested from and refused by the Attorney representing Petitioner Almieda-Sanchez, and has been requested from and given by the Solicitor General.

The interest of *Amicus Curiae* in the present case, and the reasons he moves for leave to file his brief at this time are as follows:

1. *Amicus Foerster* has petitioned this Court to grant Certiorari to review his criminal conviction for

violation of Title 21 U.S.C. §176a. The issues raised by that petition are the same as those raised by this case. The decision in this case will probably be dispositive of the issues raised by *Amicus* in his petition.

2. Attorney for *Amicus* has read the briefs of Petitioner Almieda-Sanchez and of the United States. Petitioner Almieda-Sanchez appears to be arguing, among other things, that probable cause is required to stop and search a vehicle for aliens near an international border. The government, on the other hand, contends that no cause or suspicion of any kind is required to stop and search vehicles for aliens within 100 miles of the border.

It is the position of *Amicus* that each party paints with too broad a brush. *Amicus* believes that the Court should fashion finely honed tools which both allow the government adequate enforcement techniques, while affording substantial protections for domestic travelers near our borders.

Neither the United States nor Almieda-Sanchez has suggested what such tools should be; each contends for a broad rule supporting the respective positions asserted.

Amicus had hoped that the parties would present positions closely paralleling his own. However, they have not and thus *Amicus* finds it necessary to file his brief at this time in order to suggest to the Court a method of resolving the issues not asserted by either party.

3. Additionally, it is unclear to *Amicus* whether his Petition for Certiorari will be granted, or whether

his Petition will be held pending decision in this case. Were the Petition of *Amicus* held pending decision, *Amicus* would have no opportunity to present his position to the Court.

4. This *Amicus* brief is filed within the time for the filing of Petitioner's reply brief, and is intended primarily as a reply to the position of the United States. It is imperative that the fundamental errors in the government's position be exposed, for if its position is adopted, serious inroads will have been made on the constitutional rights of a large segment of American society.

Dated, Berkeley, California,
November 14, 1972.

Respectfully submitted,
ARTHUR WELLS, JR.,
Attorney for Amicus Curiae

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

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CONDRADO ALMIEDA-SANCHEZ, *Petitioner*

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BRIEF AMICUS CURIAE OF GILBERT FOERSTER

OUTLINE OF ARGUMENT

I

Congress has not sought to define what constitutes a reasonable method of enforcing United States immigration law; the Attorney General has attempted to usurp that power, which properly belongs to this Court.

II

If this Court is to relax the traditional requirement of probable cause as a prerequisite to some vehicular searches because of unique considerations applicable to international travel, then it must at least require the government to demonstrate that vehicles searched

without probable cause have some nexus with international travel.

III

Sound constitutional adjudication requires that the government, when it interferes with a citizen's right of privacy, 1) have some quantum of evidence indicating a particularized reason for the specific interference, and 2) proceed in a manner which, consistent with its objectives, has the least onerous impact on that citizen's right of privacy.

A. Some quantum of specific objective information has always been required to justify an invasion of privacy. The type of invasion permitted depends primarily upon the quantity and quality of the information.

B. In order to properly balance competing constitutional mandates, this Court must require the government to proceed by the alternative which places the least onerous burden on individual rights.

IV

A vehicular search for aliens is a major interference with a citizen's right of privacy, and therefore cannot be permitted without a standard of cause amounting to at least reasonable suspicion, especially where, as here, the government has not shown that its enforcement duties will be seriously hampered by the imposition of such a standard.

A. A vehicular search for aliens is a major interference with a citizen's right of privacy.

B. The government has failed to show that it cannot enforce the immigration laws pursuant to reasonable search rules nor even shown that it has attempted to fashion reasonable rules governing investigation of vehicles for aliens.

C. "Reasonable suspicion" is a reasonable rule.

ARGUMENT

I

CONGRESS HAS NOT SOUGHT TO DEFINE WHAT CONSTITUTES A REASONABLE METHOD OF ENFORCING UNITED STATES IMMIGRATION LAW; THE ATTORNEY-GENERAL HAS ATTEMPTED TO USURP THAT POWER, WHICH PROPERLY BELONGS TO THIS COURT.

Petitioner Almieda-Sanchez is apparently arguing that the statute under which the search herein was purportedly conducted, 8 U.S.C. §1357(a)(3) is unconstitutional. Petitioner's Opening Brief 20. The government, in response, asserts that "the central issue" is one of Congressional power. Brief for Respondent 8. If the constitutionality of that section is really in issue, then this Court should approach the problems presented with considerable deference for the acts of a coordinate branch of government, even though this Court could not support a legislative enactment which nevertheless violated the Fourth Amendment. *Boyd v. U.S.*, 116 U.S. 616 (1886). However, such is not the situation; none of the issues in this case properly raises the issue of the constitutionality of 8 U.S.C. §1357(a)(3).

All Congress did when it passed §1357(a)(3) was to state that immigration officials could conduct searches of places other than dwellings without warrant within a reasonable distance from international borders. The code section thus purports to dispense with a warrant requirement for vehicle searches and limits the search authority of immigration officials in geographical terms. But the subsection contains no directive or indication as to the basis required for a search or the manner in which it is to be conducted. On that point, the code is silent.

The legislature's failure to set a standard for searches for aliens is evident when §1357(a)(3) is contrasted with §1357(c), for in §1357(c) Congress specifically required a "reasonable cause to suspect" for a search of aliens seeking admission to the United States.

Further, whatever rights to privacy may exist for travelers, aliens seeking admission to the United States obviously have the least rights. Yet Congress required that a reasonable suspicion of grounds for exclusion exist to justify a search. An anomalous interpretation of the statute would result if this Court were to hold that a reasonable suspicion must exist to search aliens seeking entry, but no cause need exist to invade the privacy rights of citizens lawfully using the roads within the country.

The present lack of regulation has come about through inappropriate action by the Attorney General. Congress delegated to the Attorney General the right to make regulations governing some aspects of immi-

gration searches, 8 U.S.C. §1357(a). The Attorney General then promulgated regulations setting forth 100 miles, an apparently arbitrary distance, as a "reasonable" distance. No regulations at all have been passed to govern the manner in which searches for aliens are to be conducted or the basis required for such searches.[1]

Failure to pass such regulations strongly indicates that, at one time, the Attorney General read the statute the same way *Amicus* now reads it: no such regulations were passed because Congress did not legislate concerning the basis for or manner of conducting searches for aliens, and therefore rule making power in that area was not delegated to the Attorney General.

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[1]Thus, the apparent search policy of the Immigration Service:

"Well, our *formal* policy, our past apprehension reports show about 90% of our apprehensions come from Mexican-Americans or Mexican aliens. We pull these people predominantly over. We pull U-haul trucks. We cannot see inside—almost any vehicle that comes through that we cannot observe on the inside as a matter of policy, automatically pull those over.

"Vehicles that have the back end unusually low to the ground, indicating an unnecessary or unusual amount of weight in the trunk are often times suspect. Then it is a kind of undefinable thing except based on experience. You have been in the business a long time and some people look a little bit different to you, and they are worth a check, or they may not be, but they may be. So I say it is based a lot on experience and a great deal of what we are looking for." (Emphasis added)

Testimony in *Foerster v. U.S.*, Pet. for Cert. pending, No. 71-1293, cited in Petition at 8.

Contrast U.S. Treasury Dept., Bureau of Customs, Inspector's Manual for the Guidance of Customs Officers (1969 Revision), cited in part in the Brief for the United States, at pp. 19 and 35, in *U.S. v. Johnson*, cert. granted 400 U.S. 990, dismissed under Rule 60(2) on motion of the United States ___ U.S. ___, 30 L.ed.2d 35 (1971).

This matter is discussed further herein at pp. 27-29, *infra*.

But irrespective of whatever the Attorney General's position once may have been, he has since continually argued that his own regulations, or failure to pass regulations, control, and that all searches for aliens within 100 miles of the border are *per se* constitutional because of a regulation which speaks to geographical considerations only.

The Attorney General is thus seeking constitutional powers beyond those permissible. On the basis of a questionable delegation of authority from Congress, he first purports to legislate as to when searches are legal and when they are not. (Such power does not even belong to the Congress, for it cannot legitimize unconstitutional behavior). And, going even further, the Attorney General then argues that his own regulations usurp the right to declare when searches are constitutional, a traditional and proper function of this Court.

II

IF THIS COURT IS TO RELAX THE TRADITIONAL REQUIREMENT OF PROBABLE CAUSE AS A PREREQUISITE TO SOME VEHICULAR SEARCHES BECAUSE OF UNIQUE CONSIDERATIONS APPLICABLE TO INTERNATIONAL TRAVEL, THEN IT MUST AT LEAST REQUIRE THE GOVERNMENT TO DEMONSTRATE THAT VEHICLES SEARCHED WITHOUT PROBABLE CAUSE HAVE SOME NEXUS WITH INTERNATIONAL TRAVEL.

The government argues in this case that unique problems connected with policing international travel justify searches without warrant and without probable

cause.[2] Brief for Respondent 22, 24-25. It demands continued constitutional *carte blanche* in its efforts to deter and detect illegal alien entries.[3]

Amicus agrees that the imposition of a warrant requirement for immigration searches is inappropriate. But that concession in no way detracts from the rule that

> ". . . searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative. [T]he burden is on those seeking the exemption to show the need for it."
>
> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), at 454-55.

The government asks not only for an exception to the warrant requirement, but also asks to be excused from the requirement of showing probable cause for vehicle searches for aliens. This would require the

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[2]It should be noted that the Government has failed to show that its policing problems at the border are *unique*, i.e., different from other common crime areas where search is important, such as narcotics investigation. This point is also germane to other aspects of the questions presented and is discussed at p. 30, *infra*. Uniqueness may be assumed for purposes of argument in this section.

[3]The Government's view of the problem is premised on a number of factual assertions upon which apparently no evidence was introduced in the trial court, and which was therefore not tested by cross-examination.

court to carve an exception from the long standing (and recently reaffirmed) rule requiring probable cause as a prerequisite to a lawful vehicle search. *Carroll v. U.S.*, 267 U.S. 132 (1924); *Chambers v. Maroney*, 399 U.S. 42 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The merits of a no-warrant, no-probable cause rule are discussed elsewhere in this brief.[4] The point here is that if there is to be a serious relaxation of long standing notions of minimal criteria for legal searches, it should only occur where facts indicate that "the exigencies of the situation make that course imperative." In other words, if there is to be a no-warrant no-probable cause rule respecting searches for aliens because of special considerations applicable to international travel, then such a rule must be limited to vehicles having some nexus with international travel.

Adoption of such a rule immediately poses the question of what standard of information is to be required to show a "nexus" with international travel.

Amicus suggests that the Court formulate a rule which requires that officials, to justify, in appropriate locations, a search, but not necessarily to justify a brief stop or interrogation, possess a reasonable suspicion, based upon articulable facts, that the vehicle in question had a nexus with international travel; that is, that the vehicle either had crossed the border or contained something or someone that recently had.

[4]See p. 15 et seq.

Probably the Court can require no more, for if it were to require probable cause to believe that a vehicle had a connection with international travel, the purpose of relaxing the probable cause requirement for searches would no doubt be defeated.

Failure to require any standard prohibits judicial review and leaves the government free to seriously invade constitutional rights of privacy upon whim of the investigating official:

> "The scheme of the Fourth Amendment becomes meaningful only when it is assured that *at some point* the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." (Emphasis added)
>
> *Terry v. Ohio*, 392 U.S. 1, 21 (1968).

Lower federal courts have required that searches by Customs officials physically removed from the border be justified by showing that the officials had facts supporting a suspicion that the vehicle crossed the border or contained contraband that had done so. *Alexander v. U.S.*, 362 F.2d 379 (9th Cir. 1966); *United States v. Mahoney*, 427 F.2d 658 (9th Cir. 1970); *United States v. Weil*, 432 F.2d 1320 (9th Cir. 1970); *United States v. Markham*, 440 F.2d 1119 (9th Cir. 1970). There is no showing that Customs work has been substantially impaired as a result of the imposition of this "border search" doctrine.

The Government has never demonstrated that its immigration work would be substantially impaired

by the adoption of such a requirement. If some random stops, non-intrusive observations and brief interrogations were permitted in properly narrow geographical areas without cause, but reasonable suspicion of international connections were required for *searches*, it is doubtful that enforcement of the immigration laws would be seriously impaired. Such a connection could be established by an informant's tip, surveillance, or conversation with occupants of the vehicle.[5]

Thus, this Court should require that officials demonstrate that a reasonable suspicion of a nexus with international travel exists for each vehicle *searched* without probable cause.

Further, *Amicus* believes that assuming the appropriate nexus is established, a reasonable suspicion test should govern when immigration officials may search for aliens, for the reasonable suspicion standard finds ample doctrinal support in recent decisions of this Court, and provides a workable rule for the administration of the immigration program. It is to a discussion of these matters that *Amicus* now turns.

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[5]Thus, for example, Petitioner Almeida-Sanchez admitted, when stopped, that he was a resident alien who had just come from Mexico. Brief for Petitioner 4; Brief for Respondent 5, 40. *Contrast:* Amicus Foerster was stopped but *was never asked* where he or the vehicle had been, and the officials had determined that he and his passenger were United States citizens before searching the vehicle. *Foerster v. U.S.*, No. 71-1293, Pet. for Cert. Pending, Petition 5-8.

III

SOUND CONSTITUTIONAL ADJUDICATION REQUIRES THAT THE GOVERNMENT, WHEN IT INTERFERES WITH A CITIZEN'S RIGHT OF PRIVACY, (1) HAVE SOME QUANTUM OF EVIDENCE INDICATING A PARTICULARIZED REASON FOR THE SPECIFIC INTERFERENCE, AND (2) PROCEED IN A MANNER WHICH, CONSISTENT WITH ITS OBJECTIVES, HAS THE LEAST ONEROUS IMPACT ON THAT CITIZEN'S RIGHT OF PRIVACY.

A

Some Quantum Of Specific Objective Information Has Always Been Required To Justify An Invasion Of Privacy. The Type Of Invasion Permitted Depends Primarily Upon The Quantity And Quality Of The Information.

Citation of authority is unnecessary to establish that this Court has consistently rejected the notion that searches may be conducted without some underlying standard of cause. Some quantum of specific information to justify a particular search has always been required.

1. Normally, probable cause is required. The government is obligated to show that it has reasonably trustworthy information about facts and circumstances which are "sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed." *Berger v. New York*, 388 U.S. 41 (1967).

2. The probable cause requirement normally means that the facts must focus on a particular person or place for a particular reason. But where enforcement problems of a unique character are present, the object of the search is not primarily for evidence of crime, and the search is of a limited nature, probable

cause requirements may be met by a more general showing, *Camara v. Municipal Court,* 387 U.S. 523 (1967); *See v. Seattle,* 387 U.S. 541 (1967). In *Camara,* this Court held that "administrative" searches of dwellings are subject to the Fourth Amendment, requiring absent consent, not only probable cause, but a warrant. The government had argued that such a requirement would totally stop enforcement, because officials would never have sufficient information to satisfy the traditional notion of probable cause that the facts specifically focus on particular places to be searched and things to be seized. *Id.,* at 534-539. This Court met the argument by holding that probable cause requirements might be satisfied by a more general showing than usually required. And this Court suggested further, in *See,* that a lesser showing might be adequate for "administrative" searches of commercial premises. *See,* at 546-47.

Here, then, is an example in which this Court, while still requiring a standard, enlarged the area of facts which would be "sufficient unto themselves" to constitute probable cause.

3. *Terry v. Ohio,* 392 U.S. 1 (1968), presents another situation in which traditional probable cause requirements were relaxed, but in which a standard of cause was still required. In *Terry,* this Court held that a police official may pat down a citizen for weapons where he has reasonable grounds to believe, based on articulable facts and inferences from those facts, that he is dealing with an armed and dangerous

individual. Thus, while not requiring facts "sufficient unto themselves," this Court still required that officers have objective information which leads them to focus on a particular individual for specific reasons.

4. The notion that a certain level of information provides an adequate focus to justify a search easily explains *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970) and *U.S. v. Biswell*, ... U.S. ....., 40 L.W. 4489 (1972). In those cases, this Court upheld legislation permitting inspection of the commercial premises of liquor and gun licenses without warrant. Justification for those decisions may be found in *See v. Seattle, supra,* or on the ground that the licensees, being made aware of the law when they receive their licenses, had no justifiable expectation of privacy. Cf. *Katz v. U.S.*, 389 U.S 347 (1967). However, each case indicates a focus on a particular very small segment of the business community, and involving searches limited to the commercial premises of licensees during business hours.

It appears that neither Colonnade nor Mr. Biswell raised the question of lack of a standard of probable cause or reasonable suspicion to justify the searches involved. Apparently both were content to rest their presentations on the lack of warrant.[6] Thus, neither case addresses itself to questions of cause to search; merely because a warrant is not required does not mean that cause is not required. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Chambers v. Maro-*

[6] In *Colonnade*, it appears that cause for suspicion existed. *Id.*, at 72-73.

ney, 399 U.S. 42 (1970). And the justification for relaxation of the warrant requirement can be found in the focus inherent in the liquor and gun licensee situation.

In summary, then, some standard of cause has always been found necessary to justify a search. And, whatever the standard, for *each search* it must be based upon specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion, *Terry v. Ohio*, *supra*, and cases cited at fn. 18 therein.

A brief re-examination of the cases just discussed from a different perspective indicates that it may be appropriate for this Court to permit, in certain locations, the brief stopping of a vehicle and a brief interrogation of its occupants without cause, while requiring a standard of cause for searches.

1. The overwhelming majority of searches are for evidence of crime. Such searches constitute major intrusions into privacy. Probable cause is uniformly required.

2. In *Camara v. Municipal Court*, *supra*, the permissible method of establishing probable cause was broadened. But the *Camara* Court carefully limited its holding to cover health and safety situations which were "neither personal in nature nor aimed at the discovery of evidence of crime."[7] *Id.*, at 537. While it is obvious that other factors, discussed below, con-

[7]Despite the government's assertion to the contrary, immigration searches are not "administrative" searches. See discussion at pp. 26-27 *infra*.

tributed to the decision, it is equally clear that the nature and scope of the search affected the decision to expand traditional probable cause notions.

3. In *Terry v. Ohio, supra,* this Court permitted a pat-down for weapons upon "reasonable suspicion," a standard less than probable cause. In other words, police, not having full probable cause, were to be limited to a "narrowly drawn authority" to pat down suspects. The nature and scope of permissible search was severely limited because of the lower standard of cause required.

This Court, then, has always made sure that the nature of the personal intrusion permitted was controlled by the information available to the government.

B

In Order To Properly Balance Competing Constitutional Mandates, This Court Must Require The Government To Proceed By The Alternative Which Places The Least Onerous Burden On Individual Rights.

The United States Constitution sets forth the respective rights of citizens and the powers of the federal government, leaving residual powers to the states. Our history provides abundant examples where the exercise of some governmental power produces an impact on some right. Yet the Constitution does not tell us whether the governmental power or the citizen's right is paramount.

The duty to resolve problems caused by the clash of conflicting constitutional mandates clearly falls on this Court. *Marbury v. Madison,* 1 Cranch 137 (1804).

Here the clash is between the federal government's powers under Article I, Section 8 of the Constitution, and the citizen's rights under the Fourth Amendment. The resolution of the conflict cannot be either to give the government total power or to give the citizen total privacy, for each of those results would negate some part of the Constitution. Rather, the resolution must result from striking a balance between the power and the right.

In the situation under discussion, the Fourth Amendment acts passively, as a shield against the sword of the government. The question is, how aggressively we should permit the swordholder to fight. The answer is, only as aggressively as necessary.

In other words, admitting that the government needs some power to enforce immigration laws, but recognizing that the exercise of such power will infringe on constitutionally protected rights of privacy, we should give to the government only the minimum authority it needs to enforce the laws. Only by requiring the government to proceed in that manner which, while permitting it to reasonably attempt to achieve its legitimate goals, results in the least infringement of constitutional rights, will the proper constitutional balance be struck.

It must be immediately conceded that any such balancing test will not produce the most efficient law enforcement possible. But it is beyond argument that in our democratic system efficiency is not the controlling principle to which all citizens' rights are subservient.

The balancing principle is well-settled:

1. *Dean Milk Co. v. City of Madison,* 340 U.S. 349 (1951) concerned the constitutionality of an ordinance regulating the sale of milk and milk products within the municipality's jurisdiction. By reason of the ordinance the plaintiff, a distributor from another state, was prevented from marketing its products in Madison. Unable to invoke the Supremacy Clause because the federal government had not legislated exclusively in the field, *id.,* at 353, plaintiff claimed that the ordinance was invalid because it imposed an undue burden on interstate commerce, an assertion with which the Court agreed. This placed the Court in the position of having to resolve the conflict between plaintiff's clear constitutional right and the City's "unquestioned power to protect the health and safety of its people." The Court struck down the ordinance, even though it found that the City had the power to regulate in the field, a proper purpose in passing the ordinance, and a need for regulation. The ordinance was struck down because it appeared that reasonable and adequate alternatives were available to it to satisfy its needs. *Id.,* at 354.

2. *Shelton v. Tucker,* 364 U.S. 479 (1960) is illustrative of the application of the "least onerous alternative" doctrine to cases involving personal rights, rather than the "commercial" right asserted in *Dean Milk. Shelton* concerned an attack on an Arkansas statute which compelled every teacher, as a condition of employment in a state supported school, to annually file an affidavit listing all organizations to which

he had belonged or regularly contributed within the past five years. While conceding that the State had an unquestioned right to investigate the fitness and competence of those whom it hired to teach, this Court nevertheless struck down the statute because

> "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.* at 488.

The doctrine has been similarly applied in *Wisconsin v. Yoder*, ... U.S. ....., 40 L.W. 4476 (1972); *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Talley v. California*, 362 U.S. 60 (1959), and *Sherbert v. Verner*, 374 U.S. 398 (1963).

3. The least onerous alternative doctrine has not been specifically articulated as such in cases dealing with the Fourth Amendment. But a reading of the cases discloses that this Court always addresses itself to an examination of the alternatives available in order to decide if a search procedure is "reasonable". Thus, to use only the cases immediately under examination as examples, in *Terry v. Ohio, supra*, the Court exhaustively examined the competing needs and alternatives, and limited the government to a pat-down check for weapons, as the alternative which imposed the least burden on rights of privacy. In *Cantara v. Municipal Court, supra*, this Court relaxed the specificity historically required to justify searches because

there was no less onerous alternative. And a similar application of the doctrine explains the different results in *See v. Seattle, supra,* and *U.S. v. Biswell, supra.* See *Biswell,* at 40 L.W. 4491.

While not clearly articulated in the Fourth Amendment decisions, the application of a doctrine requiring an examination of the alternatives available to the government is quite sensible. This Court must examine alternatives, for it must determine which searches are "reasonable", and what is reasonable depends on what alternative courses of conduct are available. While jumping from a second story window is usually considered an unreasonable method of egress from a building, it may become the only reasonable method of exit if the building is on fire.

The above discussion brings into focus the two fatal flaws upon which the government's argument is premised. The government argues that the appropriate test is to balance ". . . the governmental interest which allegedly justifies the official intrusion . . . as against the invasion entailed by the search or seizure." Brief for Respondent 11. But the appropriate test is not to balance the *interests:* both interests are of conceded importance. The proper test is to weigh the proposed method of enforcement against other alternatives available to reasonably achieve the government's goal, keeping in mind the infringements produced by the methods of enforcement.

Proper characterization of the balancing test indicates the second flaw. The government does not want this Court to closely examine its methods of enforce-

ment. Rather, it wants the Court to make a broad policy decision placing immigration enforcement powers above the Fourth Amendment, so that it can enforce a "program". Under such a "program", with unsupervised power, specific illegal searches would be regrettable but legal, as incidental to the program. But that type of balancing is not the function of a court. Instead, the Court must carefully examine the specific facts before it and make careful constitutional judgments. That can only be done by a close examination of alternative methods of enforcement and a determination of how much power it is necessary for the government to have to reasonably enforce our immigration laws.

IV

A VEHICULAR SEARCH FOR ALIENS IS A MAJOR INTERFERENCE WITH A CITIZEN'S RIGHT OF PRIVACY, AND THEREFORE CANNOT BE PERMITTED WITHOUT A STANDARD OF CAUSE AMOUNTING TO AT LEAST REASONABLE SUSPICION, ESPECIALLY WHERE, AS HERE, THE GOVERNMENT HAS NOT SHOWN THAT ITS ENFORCEMENT DUTIES WILL BE SERIOUSLY HAMPERED BY THE IMPOSITION OF SUCH A STANDARD.

A.

A Vehicular Search For Aliens Is A Major Interference With A Citizen's Right Of Privacy.

This Court has held that:

> The stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants.
>
> *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

Thus, because of the seriousness of the invasion, this Court has always required that officials meet a standard of cause as a precondition of a vehicle search. *Carroll v. U.S.*, 267 U.S. 132 (1964). *Chambers v. Maroney*, 399 U.S. 42 (1970); *Coolidge v. New Hampshire, supra.*

This rule cannot be relaxed to the point where vehicles of a large number of citizens within a large geographical area are subject to search upon an official's whim. The automobile is truly a necessary element in modern living. Indeed, it is the most common means of transportation we have. Enormous numbers of people regularly carry many private and personal things in them. Cars are made secure by locks on doors and trunks so that people can effectively exercise their rights to privacy. All those who own vehicles have expectations of privacy respecting some of the areas and contents of their vehicles, which they regularly exercise. A person must at least have the same privacy rights in his own car as he has in a public telephone. Cf. *Katz v. U.S.*, 389 U.S. 347 (1967).

As this Court has stated:

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears.
>
> *Coolidge v. New Hampshire, supra,* at 461.

There can be little doubt that a vehicle search for aliens is a major intrusion. The searches occur on the open highway. As many people are not searched, those that are are made to feel embarrassed and be-

littled by being singled out for search. The searches apparently are conducted outside and often at night, where the driver no doubt feels insecure and exposed, and where he is, indeed, exposed. The driver is inevitably where he cannot secure witnesses to the search, where he cannot obtain aid from family or friends, and, probably in most cases, a long distance from the geographical area which is familiar to him around his home.

There is no evidence that the reason for the search is explained to the driver. There is no evidence that such searches are conducted in a polite, non-aggressive manner if possible. And there is no evidence that the detention period occasioned by the search is short.

The government cannot escape the fact that its searches are gross intrusions by labeling them "administrative" searches. The only pure administrative search would be one by a health inspector for persons with a disease such as smallpox, for no one is going to be arrested for having smallpox. Cf. *Robinson v. California*, 370 U.S. 660 (1962). While one could argue that the searches were hybrid, it is clear that the primary purpose of the searches is to determine who is breaking the variety of laws covering immigration. If violators are found, they are arrested on the spot. The fact that a decision is made later to deport rather than prosecute does not render the search an "administrative" one.

The government concedes that "a variety of criminal offenses [are] involved in the illegal entry and transportation of aliens." Brief for Respondent 28,

fn. 25. But it seeks to avoid the problems raised by the searches by saying that only 11,000 aliens were prosecuted. Even if true, these figures are beside the point. The government, in footnote 25 of its brief alleges that 398,000 aliens entered without "inspection" in 1972. Of these, according to footnote 24, only 11,586 were smuggled. Thus, for all we know, almost all the smuggled aliens *were* prosecuted. More importantly, the government is obviously looking for *those who smuggle aliens.* According to footnote 24, it "netted 2880 smugglers of aliens". It does not tell us how many were prosecuted, but common sense tells us that all, or the vast majority, were.

In short, the behavior of the immigration officials constitutes a gross invasion of privacy in a search for criminal behavior.

B.

The Government Has Failed To Show That It Cannot Enforce The Immigration Laws Pursuant to Reasonable Search Rules Nor Even Shown That It Has Attempted To Fashion Reasonable Rules Governing Investigation Of Vehicles For Aliens.

In its brief, the government attempts to paint the picture of a dedicated group of immigration officials diligently working to solve a problem so insurmountable that even total search authority is of minimal effectiveness. It asserts that its need is so great that this Court should permit operation of a "program" effectively outside the strictures of the Fourth Amendment. While we are told that the Immigration Service "would not claim statutory or constitutional authority to make random vehicle inspections for

aliens in Times Square" (or presumably San Francisco, or like places), this is apparently only because "There is, quite simply, not a sufficient need . . .", Brief for Respondent 31. Thus, it is clear that the government is seeking unfettered authority.

This remarkable position is wholly unwarranted, for the Immigration Service has not even attempted to live within a set of rules. In contrast, other branches of the federal government have carefully drawn search rules which they have apparently been able to live with.

Thus, the Bureau of Customs has carefully set forth criteria controlling when and the manner in which border searches are to be conducted, U.S. Treasury Dept., Bureau of Customs, Inspector's Manual for the Guidance Of Customs Officers (1969 Revision), cited in part in Brief for Petitioner, *U.S. v. Johnson*, cert. granted 400 U.S. 990, dismissed under Rule 60(2) on motion of United States, ___ U.S. ___, 30 L.Ed.2d 35 (1971). No claim has been made that Customs cannot enforce the laws, even though such searches now require a reasonable suspicion to sustain their validity. *Henderson v. U.S.*, 390 F.2d 805 (9th Cir. 1967); *U.S. v. Johnson*, 425 F.2d 630 (9th Cir. 1971). It may be inferred that the government is satisfied with the rules it promulgated and the imposition of a reasonable suspicion standard from the fact that it voluntarily dismissed its case in *Johnson* after this Court had granted Certiorari. ___ U.S. ___, 30 L.Ed.2d 35 (1971).

Another significant contrast is presented by the government's response to our recent air piracy problems.

Certainly it must be conceded that the current extent of air piracy presents a crisis of alarming proportions. Yet the government has not only apparently conceded that probable cause is necessary to search air passengers, but has designed an elaborate procedure which provides a measured series of responses by officials based on developments with which they are confronted. This procedure, set forth and discussed in full in *U.S. v. Lopez*, 328 F.Supp. 1077 (1971), requires passengers to walk through a magnetometer without any showing of cause. If the machine is set off, a brief detention and interrogation is permitted. Thereafter, if facts develop indicating that it is appropriate, a baggage search is permitted. Officials are thus permitted to handle situations as the facts develop without undue infringement on the privacy of air passengers.

Not only has the government failed to try to set up rules to govern its immigration duties, but it has failed to demonstrate that it cannot operate within a reasonable set of rules:

1. In its brief, the government continually speaks in terms of "programs", consisting of "checks", "inspections," "traffic checking operations," and "vehicle checks". The government nowhere distinguishes between detentions, interrogations and searches. It never addresses itself to the alternative of a system which distinguishes different investigative tools.

2. The government's statistics, even if true, fail to demonstrate need for a no-cause system. We are not told how many aliens are caught as a result of

searches. *More importantly,* we are not told how many of the searches which produced aliens were in fact based on a reasonable suspicion developed from a stop, a brief interrogation or an observation of the outside of the vehicle or from an informer's tip. Thus, for all we know, the great majority of aliens may be found by means of the interrogation process without any search, or by search where the official had concrete facts justifying a reasonable suspicion.

3. With respect to the permanent sites, we are never told why they were placed in a particular location. For example, *Amicus* was stopped at a checkpoint on the main road between San Diego and Los Angeles, seventy miles north of the Mexican border, at San Clemente, California.[8] The government has not demonstrated why an equally effective checkpoint could not be established south of San Diego, where it is more probable that travelers on the highway had recently engaged in international travel, which might warrant a brief stop and interrogation without a foundation of cause. While our borders are admittedly vast, our inland areas are patently larger.

4. The government has never demonstrated why enforcement problems of immigration laws differ significantly from enforcement problems involving other laws, such as narcotics, gambling, or organized crime. It has failed to show why it cannot use the tools which are effective in those areas.

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[8]While this checkpoint is very close to the coastline, it is clear that it is a *vehicle* checkpoint. In any event, the United States has never been bothered with the problems of what might be characterized as Pacific Ocean wetbacks. Thus, no justification for the site can be found in its proximity to the shore.

In summary, then, it must be conceded that the government has needs. But it has failed to show that its immigration officials cannot properly enforce the laws within a system which gives them, rather than unfettered authority, "an escalating set of flexible responses, graduated in relation to the amount of information they possess." *Terry v. Ohio, supra,* at 10.

"Reasonable Suspicion" Is A Reasonable Rule.

Amicus will here summarize his position.

1. A rule permitting brief stops and interrogations without cause is proper if limited to areas within a reasonable distance from the border, which is not always 100 miles. The government should be required to show that the distance is reasonable by showing prevailing conditions.

2. Before a *search* of a vehicle is permitted the government must show that it possesses specific articulable facts providing a reasonable suspicion that the vehicle or its occupants have a nexus with international travel and that the vehicle contains aliens. Such a rule would permit searches based on the condition of the car (whether it is riding low), any informer's tip, inconsistencies in the occupant's story, or foreign nationality, to name only a few instances. Searches based merely on the type of vehicle would not be permitted because almost all vehicles could conceal aliens.

3. Searches where no nexus has been shown would require probable cause.

While this set of rules will not result in a system in which all illegal aliens are apprehended, it will probably be as effective as the unconstitutional one now in force. The proposed rules, however, do provide a reasonable solution to the problem by giving the government a flexible system with measured responses designed to insure the least infringement on constitutionol rights possible.

Dated, Berkeley, California,
November 14, 1972.

Respectfully submitted,
ARTHUR WELLS, JR.,
Attorney for Amicus Curiae.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALMEIDA-SANCHEZ *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 71-6278. Argued March 19 and 28, 1973—
Decided June 21, 1973

Petitioner, a Mexican citizen and holder of a valid work permit, challenges the constitutionality of the Border Patrol's warrantless search of his automobile 25 air miles north of the Mexican border. The search, made without probable cause or consent, uncovered marihuana, which was used to convict petitioner of a federal crime. The Government seeks to justify the search on the basis of § 287 (a) of the Immigration and Nationality Act, which provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States," as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulation defines "reasonable distance" as "within 100 air miles from any external boundary of the United States." The Court of Appeals upheld the search on the basis of the Act and regulation. *Held:* The warrantless search of petitioner's automobile, made without probable cause or consent, violated the Fourth Amendment. Pp. 3–8.

(a) The search cannot be justified on the basis of any special rules applicable to automobile searches, as probable cause was lacking; nor can it be justified by analogy with administrative inspections, as the officers had no warrant or reason to believe that petitioner had crossed the border or committed an offense, and there was no consent by petitioner. Pp. 3–5.

(b) The search was not a border search or the functional equivalent thereof. Pp. 6–8.

452 F. 2d 459, reversed.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. POWELL, J., filed a concurring opinion. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined.

SUPREME COURT OF THE UNITED STATES

Syllabus

ALMEIDA-SANCHEZ v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 71-6229. Argued March 19, 1973—
Decided June 21, 1973

SUPREME COURT OF THE UNITED STATES

No. 71-6278

Condrado Almeida-Sanches, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 21, 1973]

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner in this case, a Mexican citizen holding a valid United States work permit, was convicted of having knowingly received, concealed, and facilitated the transportation of a large quantity of illegally imported marihuana in violation of 21 U. S. C. § 176 (a). His sole contention on appeal was that the search of his automobile that uncovered the marihuana was unconstitutional under the Fourth Amendment and that, under the rule of *Weeks* v. *United States*, 232 U. S. 383, the marihuana should not have been admitted as evidence against him.

The basic facts in the case are neither complicated nor disputed. The petitioner was stopped by the United States Border Patrol on State Highway 78 in California, and his car was thoroughly searched. The road is essentially an east-west highway that runs for part of its course through an undeveloped region. At about the point where the petitioner was stopped the road meanders north as well as east—but nowhere does the road reach the Mexican border, and at all points it lies north of Interstate 80, a major east-west highway entirely within the United States that connects the Southwest with the west coast. The petitioner was some 25 air miles north of the border when he was stopped. It is undenied that the

Border Patrol had no search warrant, and that there was no probable cause of any kind for the stop or the subsequent search—not even the "reasonable suspicion" found sufficient for a street detention and weapons search in *Terry* v. *Ohio*, 392 U. S. 1, and *Adams* v. *Williams*, 407 U. S. 143.

The Border Patrol conducts three types of surveillance along inland roadways, all in the asserted interest of detecting the illegal importation of aliens. Permanent checkpoints are maintained at certain nodal intersections; temporary checkpoints are established from time to time at various places; and finally, there are roving patrols such as the one that stopped and searched the petitioner's car. In all of these operations, it is argued, the agents are acting within the Constitution when they stop and search automobiles without a warrant, without probable cause to believe the cars contain aliens, and even without probable cause to believe the cars have made a border crossing. The only asserted justification for this extravagant license to search is § 287 (a) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a), which simply provides for warrantless searches of automobiles and other conveyances "within a reasonable distance from any external boundary of the United States," as authorized by regulations to be promulgated by the Attorney General. The Attorney General's regulation, 8 CFR § 287.1, defines "reasonable distance" as "within 100 air miles from any external boundary of the United States."

The Court of Appeals for the Ninth Circuit recognized that the search of petitioner's automobile was not a "border search," but upheld its validity on the basis of the above-mentioned portion of the Immigration and Nationality Act and the accompanying regulation. 452 F. 2d 459, 461. We granted certiorari, 406 U. S. 944, to consider the constitutionality of the search.

I

No claim is made, nor could one be, that the search of the petitioner's car was constitutional under any previous decision of this Court involving the search of an automobile. It is settled, of course, that a stop and search of a moving automobile can be made without a warrant. That narrow exception to the warrant requirement was first established in *Carroll* v. *United States*, 267 U. S. 132. The Court in *Carroll* approved a portion of the Volstead Act providing for warrantless searches of automobiles when there was probable cause to believe they contained illegal alcoholic beverages. The Court recognized that a moving automobile on the open road presents a situation "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." 267 U. S., at 153. *Carroll* has been followed in a line of subsequent cases,[1] but the *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, there must be probable cause for the search.[2] As MR. JUSTICE WHITE wrote for the Court in *Chambers* v. *Maroney*, 399 U. S. 42, 51, "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution."

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[1] *E. g.*, *Chambers* v. *Maroney*, 399 U. S. 42; *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216; *Brinegar* v. *United States*, 338 U. S. 160; *Husty* v. *United States*, 282 U. S. 694.

[2] Moreover, "neither *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an automobile even with probable cause may be made without the extra protection for privacy that a warrant affords." *Chambers* v. *Maroney*, 399 U. S., at 50. See also *Coolidge* v. *New Hampshire*, 403 U. S. 443, 458–464.

In seeking a rationale for the validity of the search in this case, the Government thus understandably sidesteps the automobile search cases. Instead, the Government relies heavily on cases dealing with administrative inspections. But these cases fail to support the constitutionality of this search.

In *Camara* v. *Municipal Court*, 387 U. S. 523, the Court held that administrative inspections to enforce community health and welfare regulations could be made on less than probable cause to believe that particular dwellings were the sites of particular violations. *Id.*, at 534–536, 538. Yet the Court insisted that the inspector obtain either consent or a warrant supported by particular physical and demographic characteristics of the areas to be searched. *Ibid.* See also *See* v. *City of Seattle*, 387 U. S. 541. The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant,[*] probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camara* when it insisted that the "discretion of the official in the field" be circumscribed by obtaining a warrant prior to the inspection. *Id.*, at 532–533.

Two other administrative inspection cases relied upon by the Government are equally inapposite. *Colonnade Catering Corporation* v. *United States*, 397 U. S. 72, and *United States* v. *Biswell*, 406 U. S. 311, both approved warrantless inspections of commercial enterprises engaged in businesses closely regulated and licensed by the Government. In *Colonnade*, the Court stressed the long history of federal regulation and taxation of the manu-

[*] The Justices who join this opinion are divided upon the question of the constitutionality of area search warrants such as described in MR. JUSTICE POWELL's concurring opinion.

facture and sale of liquor, 397 U. S., at 76–77. In *Biswell*, the Court noted the pervasive system of regulation and reporting imposed on licensed gun dealers, 406 U. S., at 312 n. 1, 315–316.

A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him. As the Court stated in *Biswell:*

> "It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection. Each licensee is annually furnished with a revised compilation of ordinances that describe his obligations and define the inspector's authority . . . . The dealer is not left to wonder about the purposes of the inspector or the limits of his task." *United States* v. *Biswell*, 406 U. S., at 316.

Moreover, in *Colonnade* and *Biswell*, the searching officers knew with certainty that the premises searched were in fact utilized for the sale of liquor or guns. In the present case, by contrast, there was no such assurance that the individual searched was within the proper scope of official scrutiny—that is, there was no reason whatever to believe that he or his automobile had even crossed the border, much less that he was guilty of the commission of an offense.

II

Since neither this Court's automobile search decisions nor its administrative inspection decisions provide any support for the constitutionality of the stop and search in the present case, we are left simply with the statute that purports to authorize automobiles to be stopped and searched, without a warrant and "within a reasonable distance from any external boundary of the United States." It is clear, of course, that no Act of Congress can authorize a violation of the Constitution. But under familiar principles of constitutional adjudication, our duty is to construe the statute, if possible, in a manner consistent with the Fourth Amendment. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 348 (Brandeis, J., concurring).

It is undoubtedly within the power of the Federal Government to exclude aliens from the country. *Chae Chan Ping* v. *United States*, 130 U. S. 581, 603–604. It is also without doubt that this power can be effectuated by routine inspections and searches of individuals or conveyances seeking to cross our borders. As the Court stated in *Carroll* v. *United States*: "Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." 267 U. S. 132, 154. See also *Boyd* v. *United States*, 116 U. S. 616.

Whatever the permissible scope of intrusiveness of a routine border search might be, searches of this kind may in certain circumstances take place not only at the border itself, but at its functional equivalents as well. For example, searches at an established station near the

border, at a point marking the confluence of two or more roads that extend from the border, might be functional equivalents of border searches. For another example, a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City would clearly be the functional equivalent of a border search.[4]

But the search of the petitioner's automobile by a roving patrol, on a California road that lies at all points at least 20 miles north of the Mexican border,[5] was of a wholly different sort. In the absence of probable cause or consent, that search violated the petitioner's Fourth Amendment right to be free of "unreasonable searches and seizures."

It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that coun-

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[4] With respect to aircraft, 8 CFR § 281.1 defines "reasonable distance" as "any distance fixed pursuant to paragraph (b) of this section." Paragraph (b) authorizes the Commissioner of Immigration and Naturalization to approve searches at a greater distance than 100 air miles from a border "because of unusual circumstances."

[5] The Government represents that the highway on which this search occurred is a common route for illegally entered aliens to travel, and that roving patrols apprehended 192 aliens on that road in one year. But it is of course quite possible that every one of those aliens was apprehended as a result of a valid search made upon probable cause. On the other hand, there is no telling how many perfectly innocent drivers have been stopped on this road without any probable cause, and been subjected to a search in the trunks, under the hoods, and behind the rear seats of their automobiles.

sels a resolute loyalty to constitutional safeguards. It is well to recall the words of Mr. Justice Jackson, soon after his return from the Nuremberg Trials:

> "These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among the deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar* v. *United States*, 338 U. S. 160, 180 (Jackson, J., dissenting).

The Court that decided *Carroll* v. *United States*, *ante*, sat during a period in our history when the Nation was confronted with a law enforcement problem of no small magnitude—the enforcement of the Prohibition laws. But that Court resisted the pressure of official expedience against the guarantee of the Fourth Amendment. Chief Justice Taft's opinion for the Court distinguished between searches at the border and in the interior, and clearly controls the case at bar:

> "It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free pas-

sage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." 267 U. S., at 154.

Accordingly, the judgment of the Court of Appeals is

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 71-6278

Condrado Almeida-Sanchez, Petitioner, v. United States,	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 21, 1973]

MR. JUSTICE POWELL, concurring.

While I join the opinion of the Court, which sufficiently establishes that none of our Fourth Amendment decisions supports the search conducted in this case, I add this concurring opinion to elaborate on my views as to the meaning of the Fourth Amendment in this context. We are confronted here with the all too familiar necessity of reconciling a legitimate need of government with constitutionally protected rights. There can be no question as to the seriousness and legitimacy of the law enforcement problem with respect to enforcing along thousands of miles of open border valid immigration and related laws. Nor can there be any question as to the necessity, in our free society, of safeguarding persons against searches and seizures proscribed by the Fourth Amendment. I believe that a resolution of the issue raised by this case is possible with due recognition of both of these interests, and in a manner compatible with the prior decisions of this Court.[1]

I

The search here involved was carried out as part of a roving search of automobiles in an area generally proxi-

[1] I am in accord with the Court's conclusion that nothing in § 287 (a) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a), or in 8 CFR 287.1 serves to authorize an otherwise unconstitutional search.

mate to the Mexican border. It was not a border search, nor can it fairly be said to have been a search conducted at the "functional equivalent" of the border. Nor does this case involve the constitutional propriety of searches at permanent or temporary check points removed from the border or its functional equivalent. Nor, finally, was the search based on cause in the ordinary sense of specific knowledge concerning an automobile or its passengers.[2] The question posed, rather, is whether and under what circumstances the Border Patrol may lawfully conduct roving searches of automobiles in areas not far removed from the border for the purpose of apprehending aliens illegally entering or in the country.

The Government has made a convincing showing that large numbers of aliens cross our borders illegally at places other than established crossing points, that they are often assisted by smugglers, that even those who cross on foot are met and transported to their destinations by automobiles, and that roving checks of automobiles are the only feasible means of apprehending them. It would, of course, be wholly impracticable to maintain a constant patrol along thousands of miles of border. Moreover, because many of these aliens cross the border on foot, or at places other than established checkpoints, it is simply not possible in most cases for the Government to obtain specific knowledge that a person riding or stowed in an automobile is an ailen illegally in the coun-

[2] The Solicitor General's brief in this Court states explicitly that "We . . . do not take the position that the checking operations are justified because the officers have probable cause or even 'reasonable suspicion' to believe, with respect to each vehicle checked, that it contains an illegal alien. Apart from the reasonableness of establishment of the checking operation in this case, there is nothing in the record to indicate that the Border Patrol officers had any special or particular reason to stop petitioner and examine his car." Brief for the United States, pp. 9–10.

try. Thus the magnitude of the problem is clear. An answer, reconciling the obvious needs of law enforcement with relevant constitutional rights, is far less clear.

II

The Government's argument to sustain the search here is simply that it was reasonable under the circumstances. But it is by now axiomatic that the Fourth Amendment's proscription of "unreasonable searches and seizures" is to be read in conjunction with its command that "no Warrants shall issue, but upon probable cause." Under our cases, both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, though in certain limited circumstances neither is required.

Before deciding whether a warrant is required, I will first address the threshold question of whether some functional equivalent of probable cause may exist for the type of search conducted in this case. The problem of ascertaining the meaning of the probable cause requirement in the context of roving searches of the sort conducted here is measurably assisted by the Court's opinion in *Camara* v. *Municipal Court*, 387 U. S. 523 (1967), on which the Government relies heavily. The Court was there concerned with the nature of the probable cause requirement in the context of searches to identify housing code violations and was persuaded that the only workable method of enforcement was periodic inspection of all structures:

> "It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building." 387 U. S., at 536.

In concluding that such general knowledge met the probable cause requirement under those circumstances, the Court took note of a "long history of judicial and public acceptance," of the absence of other methods for vindicating the public interest in preventing or abating dangerous conditions, and of the limited invasion of privacy occasioned by administrative inspections which are "neither personal in nature nor aimed at discovery of evidence of crime." *Id.*, at 537.

Roving automobile searches in border regions for aliens, likewise, have been consistently approved by the judiciary. While the question is one of first impression in this Court, such searches uniformly have been sustained by the courts of appeals whose jurisdictions include those areas of the border between Mexico and the United States where the problem has been most severe. See, *e. g.*, *United States* v. *Miranda*, 426 F. 2d 283 (CA9 1970); *Roa-Rodriguez* v. *United States*, 410 F. 2d 1206 (CA10 1969). Moreover, as noted above, no alternative solution is reasonably possible.

The Government further argues that such searches resemble those conducted in *Camara* in that they are undertaken primarily for administrative rather than prosecutorial purposes, that their function is simply to locate those who are illegally here and to deport them. Brief for the United States, p. 28 n. 25. This argument is supported by the assertion that only 3% of aliens apprehended in this country are prosecuted. While the low rate of prosecution offers no great solace to the innocent whose automobiles are searched or to the few who are prosecuted, it does serve to differentiate this class of searches from random area searches which are no more than "fishing expeditions" for evidence to support prosecutions. The possibility of prosecution does not distinguish such searches from those involved in *Camara*. Despite the Court's assertion in that case that the searches

were not "aimed at the discovery of crime," 387 U. S., at 537, violators of the housing code there were subject to criminal penalties. *Id.*, at 527 n. 2.

Of perhaps greater weight is the fact that these searches, according to the Government, are conducted in areas where the concentration of illegally-present aliens is high, both in absolute terms and in proportion to the number of persons legally present. While these searches are not border searches in the conventional sense, they are incidental to the protection of the border and draw a large measure of justification from the Government's extraordinary responsibilities and powers with respect to the border. Finally, and significantly, these are searches of automobiles rather than searches of persons or buildings. The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building. This Court "has long distinguished between an automobile and a home or office." *Chambers* v. *Maroney*, 399 U. S. 42, 48 (1970). As the Government has demonstrated, and as those in the affected areas surely know, it is the automobile which in most cases makes effective the attempts to smuggle aliens into this country.

The conjunction of these factors—consistent judicial approval, absence of a reasonable alternative for the solution of a serious problem, and only a modest intrusion on those whose automobiles are searched—persuades me that under appropriate limiting circumstances there may exist a constitutionally adequate equivalent of probable cause to conduct roving vehicular searches in border areas.

III

The conclusion that there may be probable cause to conduct roving searches does not end the inquiry, for "except in certain carefully defined classes of cases, a

search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court*, *supra*, 387 U. S., at 528, 529. I expressed the view last Term that the warrant clause reflects an important policy determination: "The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility is to enforce the laws, to investigate and to prosecute . . . . But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks." *United States* v. *United States District Court*, 407 U. S. 297, 317 (1972). See also *Coolidge* v. *New Hampshire*, 403 U. S. 443, 481 (1971); *Chimel* v. *California*, 395 U. S. 752, 763–764 (1969).

To justify warrantless searches in circumstanes like those presented in this case, the Government relies upon several of this Court's decisions recognizing exceptions to the warrant requirement. A brief review of the nature of each of these major exceptions illuminates the relevant considerations in the present case. In *Terry* v. *Ohio*, 392 U. S. 1 (1968), the Court held that a policeman may conduct a limited "pat down" search for weapons when he has reasonable grounds for believing that criminal conduct has taken or is taking place and that the person he searches is armed and dangerous. "The sole justification [for such a] search . . . is the protection of the police officer and others nearby. . . ." 392 U. S., at 29. Nothing in *Terry* supports an exception to the warrant requirement here.

Colonnade Catering Corp. v. *United States*, 397 U. S. 72 (1970), and *United States* v. *Biswell*, 406 U. S. 311 (1972), on which the Government also relies, both concerned the standards which govern inspections of the

business premises of those with federal licenses to engage in the sale of liquor, *Colonnade*, or the sale of guns, *Biswell*. In those cases, Congress was held to have power to authorise warrantless searches. As the Court stated in *Biswell*:

> "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection," 406 U. S., at 316.

Colonnade and *Biswell* cannot fairly be read to cover cases of present type. One who merely travels in regions near the borders of the country can hardly be thought to have submitted to inspections in exchange for a special perquisite.

More closely in point on their facts are the cases involving automobile searches. *E. g., Carroll* v. *United States*, 267 U. S. 132 (1925); *Chambers* v. *Maroney*, *supra*; *Coolidge* v. *New Hampshire*, *supra*. But while those cases allow automobiles to be searched without a warrant in certain circumstances, the principal rationale for this exception to the warrant clause is that under those circumstances "it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll* v. *United States*, *supra*, 267 U. S., at 153. The Court today correctly points out that a warrantless search under the *Carroll* line of cases must be supported by probable cause in the sense of specific knowledge about a particular automobile. While, as indicated above, my view is that on appropriate facts the Government can satisfy the probable cause requirement for a roving search in a border area without possessing information about particular automobiles, it does not follow that the warrant requirement is inapposite. The

very fact that the Government's supporting information relates to criminal activity in certain areas rather than to evidence about a particular automobile renders irrelevant the justification for warrantless searches relied upon in *Carroll* and its progeny. Quite simply the roving searches are justified by experience with obviously nonmobile sections of a particular road or area embracing several roads.

None of the foregoing exceptions to the warrant requirement, then, applies to roving automobile searches in border areas. Moreover, the propriety of the warrant procedure here is affirmatively established by *Camara*. See also *See* v. *City of Seattle*, 387 U. S. 541 (1967). For the reasons outlined above, the Court there ruled that probable cause could be shown for an area search, but nonetheless required that a warrant be obtained for unconsented searches. The Court indicated its general approach to exceptions to the warrant requirement:

> "In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." 387 U. S., at 533.

See also *United States* v. *United States District Court*, *supra*, 407 U. S., at 315.

The Government argues that *Camara* and *See* are distinguishable from the present case for the purposes of the warrant requirement. It is true that while a building inspector who is refused admission to a building may easily obtain a warrant to search that building, a mem-

ber of the Border Patrol has no such opportunity when he is refused permission to inspect an automobile. It is also true that the judicial function envisioned in *Camara* did not extend to reconsideration of "the basic agency decision to canvass any area," 387 U. S., at 532, while the judicial function here would necessarily include passing on just such a basic decision.

But it does not follow from these distinctions that "no warrant system can be constructed that would be feasible and meaningful." Brief for the United States, at 36. Nothing in the papers before us demonstrates that it would not be feasible for the Border Patrol to obtain advance judicial approval of the decision to conduct roving searches on a particular road or roads for a reasonable period of time.[3] According to the Government, the incidence of illegal transportation of aliens on certain roads is predictable, and the roving searches are apparently planned in advance or carried out according to a predetermined schedule. The use of an area warrant procedure would surely not "frustrate the governmental purpose behind the search." *Camara* v. *Municipal Court, supra,* 387 U. S., at 533. It would of course entail some inconvenience, but inconvenience alone has never been thought to be an adequate reason for abrogating the warrant requirement. *E. g., United States* v. *United States District Court, supra,* 407 U. S., at 321.

Although standards for probable cause in the context of this case are relatively unstructured (cf. *United States* v. *United States District Court, supra,* 407 U. S., at 322), there are a number of relevant factors which would merit

[3] There is no reason why a judicial officer could not approve where appropriate a series of roving searches over the course of several days or weeks. Experience with an initial search or series of searches would be highly relevant in considering applications for renewal of a warrant.

consideration: they include (i) the frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) the extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use,[4] and (iv) the probable degree of interference with the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area.

In short, the determination of whether a warrant should be issued for an area search involves a balancing of the legitimate interests of law enforcement with protected Fourth Amendment rights. This presents the type of delicate question of constitutional judgment which ought to be resolved by the Judiciary rather than the Executive. In the words of *Camara*,

> "This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search." 387 U. S., at 532–533.

Nor does the novelty of the problem posed by roving searches in border areas undermine the importance of a prior judicial determination. When faced with a similarly unconventional problem last Term in *United States District Court*, *supra*, we recognized that the focus of the search there involved was "less precise than that directed

[4] Depending upon the circumstances, there may be probable cause for the search to be authorized only for a designated portion of a particular road or such cause may exist for a designated area which may contain one or more roads or tracks. Particularly along much of the Mexican border, there are vast areas of uninhabited desert and arid land which are traversed by few, if any, main roads or highways, but which nevertheless may afford opportunities—by virtue of their isolated character—for the smuggling of aliens.

against more conventional types of crime," and that "[d]ifferent standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government . . . and the protected rights of our citizens." 407 U. S., at 322–323. Yet we refused to abandon the Fourth Amendment commitment to the use of search warrants whenever this is feasible with due regard to the interests affected.

For the reasons stated above, I think a rational search warrant procedure is feasible in cases of this kind. As no warrant was obtained here, I agree that the judgment must be reversed. I express no opinion as to whether there was probable cause to issue a warrant on the facts of this particular case.

SUPREME COURT OF THE UNITED STATES

No. 71–6278

Condrado Almeida-Sanchez, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 21, 1973]

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

Trial and conviction in this case were in the United States District Court for the Central District of California under an indictment charging that petitioner, contrary to 21 U. S. C. § 176 (a) (1964), had knowingly received, concealed and facilitated the transportation of approximately 161 pounds of illegally imported marihuana. He was sentenced to five years imprisonment. He appealed on the sole ground that the District Court had erroneously denied his motion to suppress marihuana allegedly seized from his automobile in violation of the Fourth Amendment.

The motion to suppress was heard on stipulated evidence in the District Court.[1] United States Border Patrol Officers Shaw and Carrasco stopped petitioner's car shortly after midnight as it was traveling from Calexico, on the California-Mexico border, towards Blythe, California. The stop was made on Highway 78 near Glamis, California, 50 miles by road from Calexico. The highway was "about the only north-south road in California

[1] The facts, except for when petitioner was stopped, are taken from the oral stipulation in open court. See App. 11–14. The time petitioner was stopped is given by the Complaint as 12:15 a. m., App. 4, while petitioner testified at trial that he was "stopped about 1:00." Tr. of Rec., vol. 3, at 62.

coming from the Mexican border that does not have an established checkpoint."[1] Because of that, "it is commonly used to evade checkpoints by both marihuana and alien smugglers." On occasions "but not at all times," officers of the Border Patrol "maintain a roving check of vehicles and persons on that particular highway." Pursuant to this practice "they stopped this vehicle for the specific purpose of checking for aliens." Petitioner's identification revealed that he was a resident of Mexicali, Mexico, but that he held a work permit for the United States. Petitioner had come from Mexicali, had picked up the car in Calexico and was on his way to Blythe to deliver it. He intended to return to Mexicali by bus.[2] The officers had been advised by an official bulletin that aliens illegally entering the United States sometimes concealed themselves by sitting upright behind the back seat rest of a car, with their legs folded under the back seat from which the springs had been removed. While looking under the rear seat of petitioner's car for aliens, the officers discovered packages believed by them to contain marihuana. Petitioner was placed under arrest and advised of his rights. His car was then searched for additional marihuana, which was found in substantial amounts.

On this evidence, the motion to suppress was denied, and petitioner was convicted. A divided Court of Appeals affirmed, 452 F. 2d 459 (CA9 1971), relying on its prior cases and on § 287 (a) of the Immigration and Nationality Act, 8 U. S. C. § 1357 (a), which provides that

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[1] West of Glamis the prevailing direction of the highway is east-west. At the point of the stop west of Glamis, the highway is only approximately 20 miles north of the border, running parallel to it. East of Glamis, the highway proceeds sharply northeast to Blythe, a distance of over 50 miles.

[2] It appears, see App. 11, 13, that the officers were informed of these facts before initiating any search for aliens, and hence before finding any contraband.

officers of the Immigration and Naturalization Service shall have the power, without warrant, to search any vehicle for aliens within a reasonable distance from any external boundary of the United States.[4] I dissent from the reversal of this judgment.

I

The Fourth Amendment protects the people "in their persons, houses, papers, and effects, against unreasonable searches and seizures" and also provides that "no Warrants shall issue, but upon probable cause . . . ." The ordinary rule is that to be reasonable under the Amendment a search must be authorized by warrant issued by a magistrate upon a showing of probable cause. The Amendment's overriding prohibition is nevertheless against "unreasonable" searches and seizures; and the legality of searching, without warrant and without probable cause, individuals and conveyances seeking to enter the country has been recognized by Congress and the

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[4] 8 U. S. C. § 1357 (a), provides in pertinent part:

"Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

. . . . . .

"(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States . . . ."

The Court of Appeals also relied on 8 CFR § 287.1, which in relevant part provides:

"(a)(2) *Reasonable distance.* The term 'reasonable distance,' as used in section 287 (a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section."

courts since the very beginning. *Boyd* v. *United States*, 116 U. S. 616 (1886), said as much; and in *Carroll* v. *United States*, 267 U. S. 132, 154 (1925), the Court repeated that neither warrant nor probable cause was required to authorize a stop and search at the external boundaries of the United States: "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." This much is undisputed in this case. Persons and their effects may be searched at the border for dutiable articles or contraband. Conveyances may be searched for the same purposes, as well as to determine whether they carry aliens not entitled to enter the country. Neither, apparently, is it disputed that warrantless searches for aliens without probable cause may be made at fixed checkpoints away from the border.

The problem in this case centers on the roving patrol operating away from, but near, the border. These patrols may search for aliens without a warrant if there is probable cause to believe that the vehicle searched is carrying aliens illegally into the country. But without probable cause, the majority holds the search unreasonable, although at least one Justice, MR. JUSTICE POWELL, would uphold searches by roving patrols if authorized by an area warrant issued on less than probable cause in the traditional sense. I agree with MR. JUSTICE POWELL that such a warrant so issued would satisfy the Fourth Amendment, and I would expect such warrants would be readily issued. But I disagree with him and the majority that either warrant or probable cause is required in the circumstances of this case. As the Court has reaffirmed today in *Cady* v. *Dombrowski*, — U. S. —, the governing standard under the Fourth Amend-

ment is reasonableness, and in my view, that standard is sufficiently flexible to authorize the search involved in this case.

In *Terry* v. *Ohio*, 392 U. S. 1 (1968), the Court proceeding under the "general proscription against unreasonable searches and seizures," *id.*, at 20 (footnote omitted), weighed the governmental interest claimed to justify the official intrusion against the constitutionally protected interest of the private citizen. *Id.*, at 20–21. The "need to search" was balanced "against the invasion which the search . . . entails," quoting from *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, 536–537 (1967). *Id.*, at 21. In any event, as put by Mr. Chief Justice Warren, the "question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an *unreasonable* search and seizure." *Id.*, at 9 (emphasis added).

Warrantless but probable cause searches of the person and immediate surroundings have been deemed reasonable when incident to arrest, see *Chimel* v. *California*, 395 U. S. 752 (1969); and in *Terry*, the stop of a suspected individual and a pat-down for weapons without a warrant were thought reasonable on less than traditional probable cause. In *Camara* v. *Municipal Court*, *supra*, an inspection of every structure in an entire area to enforce the building codes was deemed reasonable under the Fourth Amendment without probable cause, or suspicion that any particular house or structure was in violation of law, although a warrant, issuable without probable cause, or reasonable suspicion of a violation, was required with respect to nonconsenting property owners. Also, in *Colonnade Catering Corp.* v. *United States*, 397 U. S. 72 (1970), MR. JUSTICE DOUGLAS, writing for the Court and recognizing that the Fourth Amendment bars only unreasonable searches and seizures, ruled that the historic power of the Government to control

the liquor traffic authorized warrantless inspections of licensed premises without probable cause, or reasonable suspicion, not to check on liquor quality or conditions under which it was sold, but solely to enforce the collection of the federal excise tax.[5] *United States* v. *Biswell*, 406 U. S. 311 (1972), involved the Gun Control Act of 1968 and its authorization to federal officers to inspect firearms dealers. The public need to enforce an important regulatory program was held to justify random inspections of licensed establishments without warrant and probable cause.

The Court has been particularly sensitive to the Amendment's broad standard of "reasonableness" where, as in *Biswell* and *Colonnade*, authorizing statutes permitted the challenged searches. We noted in *Colonnade* that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand," 397 U. S., at 76; and in *Biswell* we relied heavily upon the congressional judgment that the authorized inspection procedures played an important part in the regulatory system. 406 U. S., at 315–317. In the case before us, 8 U. S. C. § 1357

[5] In *Colonnade*, the conviction was set aside because it was thought that Congress, with all the authority it had to prescribe standards of reasonableness under the Fourth Amendment, had not intended federal inspectors to use force in carrying out warrantless, non-probable cause inspections. In dissent, THE CHIEF JUSTICE, joined by Justices Black and STEWART, would have sustained the search, saying: "I assume we could all agree that the search in question must be held valid, and the contraband discovered subject to seizure and forfeiture, unless (a) it is 'unreasonable' under the Constitution or (b) it is prohibited by a statute imposing restraints apart from those in the Constitution. The majority sees no constitutional violation; I agree." 397 U. S., at 78.

In a separate dissent MR. JUSTICE BLACK, joined by THE CHIEF JUSTICE and MR. JUSTICE STEWART, also emphasized the ultimate test of legality under the Fourth Amendment was whether the search and seizure were reasonable. *Id.*, at 79–81.

(a)(3), authorizes Border Patrol officers, without warrant, to search any vehicle *for aliens* "within a reasonable distance from any external boundary of the United States" and within the distance of 25 miles from such external boundary to have access to private lands, but not dwellings "for the purpose of patrolling the borders to prevent the illegal entry of aliens into the United States . . . ." At the very least, this statute represents the considered judgment of Congress that proper enforcement of the immigration laws requires random searches of vehicles without warrant or probable cause within a reasonable distance of the international borders of the country.

It is true that "[u]ntil 1875 alien migration to the United States was unrestricted." *Kleindienst* v. *Mandel*, 408 U. S. 753, 761 (1972). But the power of the National Government to exclude aliens from the country is undoubted and sweeping. "That the Government of the United States, through action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." *Chae Chan Ping* v. *United States*, 130 U. S. 581, 603–604 (1889). "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they come to this country, and to have its declared policy in that regard enforced exclusively . . . is settled by our previous adjudications." *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547 (1895). See also *Fong Yue Ting* v. *United States*, 149 U. S. 698, 711 (1893); *Yamataya* v. *Fisher*, 189 U. S. 86, 97–99 (1903); *United States ex rel. Turner*

v. *Williams*, 194 U. S. 279, 289–290 (1904); *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 335–336 (1909); *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425 (1933).

Since 1875, Congress has given "almost continuous attention . . . to the problems of immigration and of excludability of certain defined classes of aliens. The pattern generally has been one of increasing control . . . ." *Kleindienst* v. *Mandel*, *supra*, at 761–762. It was only as the illegal entry of aliens multiplied that Congress addressed itself to enforcement mechanisms. In 1917, immigration authorities were authorized to board and search all conveyances by which aliens were being brought into the United States. Act of February 5, 1917, 39 Stat. 874, 886. This basic authority, substantially unchanged, is incorporated in 8 U. S. C. § 1225 (a).

In 1946, it was represented to Congress that "[i]n the enforcement of the immigration laws it is at times desirable to stop and search vehicles within a reasonable distance from the boundaries of the United States and legal right to do so should be conferred by law." H. R. Rep. No. 186, 79th Cong., 1st Sess., 2. The House Committee on Immigration and Naturalization was "of the opinion that the legislation is highly desirable," *ibid.*, and its counterpart in the Senate, S. Rep. No. 632, 79th Cong., 1st Sess., 2, stated that "[t]here is no question but that this is a step in the right direction." The result was express statutory authority, Act of August 7, 1946, 60 Stat. 865, to conduct searches of vehicles for aliens within a reasonable distance from the border without warrant or possible cause. Moreover, in the Immigration and Nationality Act of 1952, 66 Stat. 163, Congress permitted the entry of private lands, excluding dwellings, within a distance of 25 miles from any external boundaries of the country "for the purpose of patrolling the borders to

prevent the illegal entry of aliens into the United States . . . ."

The judgment of Congress obviously was that there are circumstances in which it is reasonably necessary, in the enforcement of the immigration laws, to search vehicles and other private property for aliens, without warrant or probable cause, and at locations other than at the border. To disagree with this legislative judgment is to invalidate § 1357 in the face of the contrary opinion of Congress that its legislation comported with the standard of reasonableness of the Fourth Amendment. This I am quite unwilling to do.

The external boundaries of the United States are extensive. The Canadian border is almost 4,000 miles in length; the Mexican, almost 2,000. Surveillance is maintained over the established channels and routes of communication. But not only is inspection at regular points of entry not infallible, but it is also physically impossible to maintain continuous patrol over vast stretches of our borders. The fact is that illegal crossings at other than the legal ports of entry are numerous and recurring. If there is to be any hope of intercepting illegal entrants and of maintaining any kind of credible deterrent, it is essential that permanent or temporary check points be maintained away from the borders, and roving patrols be conducted to discover and intercept illegal entrants as they filter to the established roads and highways and attempt to move away from the border area. It is for this purpose that the Border Patrol maintained the roving patrol involved in this case and conducted random, spot checks of automobiles and other vehicular traffic.

The United States in this case reports that in fiscal year 1972, Border Patrol traffic checking operations located over 39,000 deportable aliens, of whom approxi-

mately 30,000 had entered the United States by illegally crossing the border at a place other than a port of entry. This was said to represent nearly 10% of the number of such aliens located by the Border Patrol by all means throughout the United States.[6]

Section 1357 (a)(3) authorizes only searches for aliens and only searches of conveyances and other property. No searches of the person or for contraband are authorized by the section. The authority extended by the statute is limited to that reasonably necessary for the officer to assure himself that the vehicle or other conveyance is not carrying an alien who is illegally within this country; and more extensive searches of automobiles without probable cause are not permitted by the section. *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (CA10 1969); see *Fumagalli* v. *United States*, 429 F. 2d 1011, 1013 (CA9 1970). Guided by the principles of *Camara*, *Colonnade*, and *Biswell*, I cannot but uphold the judgment of Congress that for purposes of enforcing the immigration laws it is reasonable to treat the exterior boundaries of the country as a zone, not a line, and that there are recurring circumstances in which the search of vehicular traffic without warrant and without probable cause may be reasonable under the Fourth Amendment although not carried out at the border itself.

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[6] In fiscal year 1972, 398,000 aliens who had entered the United States without inspection were located by Immigration and Naturalization officers; and of the 39,243 deportable aliens located through traffic checking operations, about one-third, 11,586, had been assisted by smugglers. 2,800 such smugglers were discovered in fiscal year 1972 through traffic checking operations.

The annual report of the Attorney General, September 1, 1972, stated at 240–241 that in fiscal year 1971, 99% of the 270,800 persons who were discovered to have entered without inspection entered across the border with Mexico. In that fiscal year, 27,900 deportable aliens were located with the assistance of observation aircraft.

This has also been the considered judgment of the three Courts of Appeals whose daily concern is the enforcement of the immigration laws along the Mexican-American border, and who, although as sensitive to constitutional commands as we are, perhaps have a better vantage point than we here on the Potomac to judge the practicalities of border-area law enforcement and the reasonableness of official searches of vehicles to enforce the immigration statutes.

The Court of Appeals for the Ninth Circuit, like other circuits, recognizes that at the border itself, persons may be stopped, identified and searched without warrant or probable cause and their effects and conveyances likewise subjected to inspection. There seems to be no dissent on this proposition. Away from the border persons and automobiles may be searched for narcotics or other contraband only on probable cause; but under § 1357 (a)(3), automobiles may be stopped without warrant or probable cause and a limited search for aliens carried out in those portions of the conveyance capable of concealing any illegal immigrant. This has been the consistent view of that court.

In *Fumagalli* v. *United States*, *supra*, Fumagalli was stopped at a check point in Imperial, California, 49 miles north of the international boundary. In the course of looking in the trunk for an illegal entrant, the odor of marihuana was detected and marihuana discovered. Fumagalli contended that the trunk of the automobile could not be examined to locate an illegal entrant absent probable cause to believe that the vehicle carried such a person. The court, composed of Judges Merrill, Hufstedler and Byrne, rejected the position, stating that "[w]hat all of these cases make clear is that probable cause is not required for an *immigration* search within approved limits (footnote omitted) but is generally required to sustain the legality of a search for *contraband*

in a person's automobile conducted away from international borders . . . . Appellant has confused the two rules in his attempt to graft the probable cause standards of the *narcotics* cases . . . onto the rules justifying immigration inspections . . . ." 429 F. 2d, at 1013. Among prior cases reaffirmed was *Fernandez* v. *United States*, 321 F. 2d 283 (1963), where an automobile was stopped 18 miles north of Oceanside, California, on Highway 101 at a point 60 to 70 miles north of the Mexican border. An inspection for illegally entering aliens was conducted, narcotics were discovered and seized and the stop and seizure were sustained under the statute. The Immigration Service, it was noted, had been running traffic checks in this area for 31 years, many illegal entrants had been discovered there and there were at least a dozen other such check points operating along the border between the United States and Mexico.[7]

The Courts of Appeal for the Fifth and Tenth Circuits share the problem of enforcing the immgration laws along the Mexican-American border. Both courts agree with the Ninth Circuit that § 1357 (a)(3) is not void and that there are recurring circumstances where, as the statute permits, a stop of an automobile without warrant or probable cause and a search of it for aliens are constitutionally permissible.

In *United States* v. *De Leon*, 462 F. 2d 170 (1972), De Leon was stopped without warrant or probable cause, while driving on the highway leading north of Laredo,

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[7] In the Court of Appeals for the Ninth Circuit, 8 U. S. C. § 1357 (a)(3) has also been sustained in *e. g.*, *Mienke* v. *United States*, 452 F. 2d 1076 (1971); *United States* v. *Marin*, 444 F. 2d 86 (1971); *Duprez* v. *United States*, 435 F. 2d 1276 (1970); *United States* v. *Sanchez-Mata*, 429 F. 2d 1391 (1970); *United States* v. *Avey*, 428 F. 2d 1159 (1970); *United States* v. *Miranda*, 426 F. 2d 283 (1970); and *United States* v. *Elder*, 425 F. 2d 1002 (1970). See also *Valenzuela-Garcia* v. *United States*, 425 F. 2d 1170 (1970), and *Barba-Reyes* v. *United States*, 387 F. 2d 91 (1967).

Texas, approximately 10 miles from the Mexican border. The purpose of the stop was to inspect for illegally entering aliens. De Leon opened the trunk as he was requested to do. A false bottom in the trunk and the odor of marihuana were immediately noticed and marihuana was seized. Judge Wisdom, writing for himself and Judges Godbold and Roney, concluded that:

> "Stopping the automobile ten miles from the Mexican border to search for illegal aliens was reasonable. *See* United States v. McDaniel, [463 F. 2d 129 (CA5 1972)]; United States v. Warner, 5 Cir. 1971, 441 F. 2d 821; Marsh v. United States, 5 Cir. 1965, 344 F. 2d 317, 8 U. S. C. §§ 1225, 1357; 19 U. S. C. §§ 482, 1581, 8 C. F. R. § 287.1; 19 C. F. R. §§ 23.1 (d), 23.11. Once the vehicle was reasonably stopped pursuant to an authorized border check the agents were empowered to search the vehicle, including the trunk, for aliens."

Similarly, *United States* v. *McDaniel, supra,* upheld a stop and an ensuing search for aliens that uncovered another crime. Judge Goldberg, with Judge Wisdom and Judge Clark, was careful to point out, however, that the authority granted under the statute must still be exercised in a manner consistent with the standards of reasonableness of the Fourth Amendment. "Once the national frontier has been crossed, the search in question must be reasonable upon *all* of the facts, only one of which is the proximity to an international border." 463 F. 2d, at 133. This view appears to have been the law in the Firth Circuit for many years.[6]

The Court of Appeals for the Tenth Circuit has expressed similar views. In *Roa-Rodriquez, supra,* the

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[6] *E. g., Kelly* v. *United States,* 197 F. 2d 162, (1952). See also *United States* v. *Bird,* 456 F. 2d 1023, 1024 (1972); *Ramirez* v. *United States,* 263 F. 2d 385, 387 (1959); and *Haerr* v. *United States,* 240 F. 2d 533, 535 (1957).

automobile was stopped in New Mexico some distance from the Mexican border, the purpose being to search for aliens. Relying on the statute, the court, speaking through Judge Breitenstein, concluded that "[i]n the circumstances, the initial stop and search for aliens were proper." 410 F. 2d, at 1208. However, when it was determined by the officers that there were no occupants of the car illegally in the country, whether in the trunk or elsewhere, the court held that the officers had no business examining the contents of a jacket found in the trunk. The evidence in this case was excluded. The clear rule of the circuit, however, is that conveyances may be stopped and examined for aliens without warrant or probable cause when in all the circumstances it is reasonable to do so.[9]

Congress has itself authorized vehicle searches at a reasonable distance from international frontiers in order to aid in the enforcement of the immigration laws. Congress has long considered such inspections constitutionally permissible under the Fourth Amendment. So also, those courts and judges best positioned to make intelligent and sensible assessments of the requirements of reasonableness in the context of controlling illegal entries into this country have consistently and almost without dissent come to the same conclusion that is embodied in the judgment that is reversed today.[10]

II

I also think that § 1357 (a) was validly applied in this case and that the search for aliens and the discovery

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[9] *E. g., United States* v. *Anderson*, 468 F. 2d 1280 (1972); and *United States* v. *McCormick*, 468 F. 2d 68 (1972).

[10] Without having undertaken an exhaustive survey, in the 20 Court of Appeals cases I have noted, including the one before us, 35 different judges of the three Courts of Appeals found inspection of vehicles for illegal aliens without warrant or probable cause to be constitutional. Only one judge has expressed a different view.

of marihuana were not illegal under the Fourth Amendment. It was stipulated that the highway involved here was one of the few roads in California moving away from the Mexican border that did not have an established check station and that it is commonly used by alien smugglers to evade regular check points. The automobile, when stopped sometime after midnight, was 50 miles along the road from the border town of Calexico, proceeding toward Blythe, California; but as a matter of fact it appears that the point at which the car was stopped was approximately only 20 miles due north of the Mexican border. Given the large number of illegal entries across the Mexican border at other than established ports of entry, as well as the likelihood that many illegally entering aliens cross on foot and meet prearranged transportation in this country, I think that under all the circumstances the stop of petitioner's car was reasonable, as was the search for aliens under the rear seat of the car pursuant to an official bulletin suggesting search procedures based on experience. Given a valid search of the car for aliens, it is in no way contended that the discovery and seizure of the marihuana was contrary to law.[11]

I would affirm the judgment of the Court of Appeals.

[11] The United States does not contend, see Tr. of Oral Arg., at 29, and I do not suggest that any search of a vehicle for aliens within 100 miles of the border pursuant to 8 CFR § 287.1 would pass constitutional muster. The possible invalidity of the regulation and of 8 U. S. C. § 1357 (a) (3) in other circumstances is not at issue here.